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## EUROPEAN DEMOCRACY AFTER THE 2003 CONVENTION

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### 1. The democratic challenge

#### 1.1. Introduction

“Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.” (Thucydides<sup>1</sup>)

This is the motto of the Draft Treaty establishing a Constitution by the European Convention of 18 July 2003<sup>2</sup> (hereafter: Draft Constitution). In principle, it suits a European constitution well to invoke Greek antiquity, which forms an important strand of common European heritage and identity. However, democratic theorists today agree that the essence of Democracy is *not* the majority principle. On the one hand, a functioning democracy needs much more than majority voting, most importantly a democratic infrastructure. On the other hand, we might even call a type of governance which rests in part on non-majoritarian modes of decision-making “democratic”. And finally, if majority-voting in the various institutions were the decisive test of democracy, the 2003 Draft Constitution itself would not be very democratic, although it offers progress in that direction.

Alluding to theory and practice dating back to the times of *Thucydides*, one of the most eminent modern theorists of democracy wrote: “Today the term democracy is like an ancient kitchen midden packed with assorted left-

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1. Thucydides (471–400 b.C.), *History of the Peloponnesian War*, Part II, 37 (referring to the Constitution of Athens under Pericles).

2. CONV 850/03 (european-convention.eu.int). See for overall assessments of the Draft Constitution Kokott and Rüth, “The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate answers to the Laeken questions?”, 40 CML Rev. (2003), 1315–1345; Schwarze, “Ein pragmatischer Verfassungsentwurf – Analyse und Bewertung des vom Europäischen Verfassungskonvent vorgelegten Entwurfs eines Vertrags über eine Verfassung für Europa”, 38 EuR (2003), 535–573.

overs from twenty-five hundred years of nearly continued usage”.<sup>3</sup> So our question today is: What kind of leftovers should be warmed up for the EU<sup>4</sup> or should we brew a fresh stew?

This article first looks at the current ideal and reality of democratic governance in the nation State and at the European level, put under stress by globalization (Part 1). In Part 2, institutional and functional aspects of democratic governance in Europe are discussed. This includes an analysis of the democratic reforms introduced by the 2003 Draft Constitution. Part 3 looks at general problems of European democracy beyond the institutional set-up. In Part 4, some suggestions are made for the future of European democratic governance, viewed against the Convention’s proposals.

### 1.2. *Current transformation of domestic democracies*

Before answering the question “how democratic is Europe?”, the democratic yardstick must first be explained.<sup>5</sup> Any evaluation of the quality of European democracy as it stands and the evaluation of reform proposals must take into account the real situation of democracy in the Member States, and not an abstract democratic ideal.<sup>6</sup> This means that we need to be aware of the current and fundamental transformations that the democratic systems in the Member States are undergoing, transformations that can be characterized with the following key-words:

- rise of the executive branch, due, *inter alia*, to more denationalized regulation;
- dominance of specialized, non-democratically elected technical experts in all subject areas of legislation;<sup>7</sup>

3. Dahl, *Dilemmas of Pluralist Democracy* (New Haven (Conn.), 1982), at 5.

4. Recent monographs on the subject include Lord, *Democracy in the European Union* (Sheffield, 1999); Scharpf, *Governing in Europe: Effective and Democratic?* (OUP, 1999); Karlsson, *Democracy, Legitimacy and the European Union* (Uppsala, 2001); McCormick, *Questioning Sovereignty* (Oxford, Clarendon, 1999); Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (Kluwer Law International, 2002).

5. A helpful contribution to a clarification of the yardstick is Lord, “Assessing Democracy in a Contested Polity”, 39 JCMS (2001), 641–661.

6. See in this sense Armingeon, “Comment: The Democratic Deficit of the European Union”, 50 *Aussenwirtschaft* (1995), 67–76.

7. A recent example from Germany is the National Council on Ethics (*Nationaler Ethikrat*), inaugurated in June 2001 as a national forum for dialogue on ethical issues in the life sciences. Its (up to 25) members were appointed by the Federal Chancellor (see [www.ethikrat.org/\\_english/about\\_us/function.htm](http://www.ethikrat.org/_english/about_us/function.htm)). Further examples are the Commission on Immigration (*Zuwanderungskommission*, final report handed over to the German Federal Government on 4 July 2001) and the Hartz Commission for the reform of the labour-market, established by the German Federal Government. See the literature on the “threat” of technocracy Fischer, *Technocracy and the Politics of Expertise* (Newbury Park (Cal.), 1990), at pp. 15–20 and at 30–35;

- para-legislation in the form of compacts, codes of conduct or agreed standards and principles;<sup>8</sup>
- these norms, or “soft laws”, are the result of (horizontal) negotiation, not of (vertical, top-down) legislation;<sup>9</sup>
- the circumvention of parliaments by individuals and other interest groups with the help of new technologies of direct communication and net-working;<sup>10</sup>

seminal work of Schelsky, *Der Mensch in der wissenschaftlichen Zivilisation* (Cologne, 1961), at pp. 29–30.

8. See e.g. the latest recommendations of the German Research Society (*Deutsche Forschungsgemeinschaft*) on research on human embryonic stem cells of May 2001, which appear to substitute legislation on that issue ([www.dfg.de/english/press/releases/Archive/presse\\_2001\\_16\\_eng.html](http://www.dfg.de/english/press/releases/Archive/presse_2001_16_eng.html)). Another example is the German compact for work (“*Bündnis für Arbeit, Ausbildung und Wettbewerbsfähigkeit*”), concluded in 1997 by the Federal government, representatives of the economy and unions (see [www.igmetall.de/buendnis/](http://www.igmetall.de/buendnis/)). In February 2003, the German Corporate Governance Code was issued, drawn up by experts from different areas of German business ([www.corporate-governance-code.de/eng/download/CorGov\\_Endfassung\\_E.pdf](http://www.corporate-governance-code.de/eng/download/CorGov_Endfassung_E.pdf)). It contains recommendations on standards and disclosure duties for listed companies for periods of six months. The object of this “soft law” self-commitment by business is to enhance transparency for investors and to improve the access of the listed companies to the international financial markets. It purposefully supplements the “hard” German Transparency and Disclosure Law.

9. See in the literature as far back as Eschenburg, *Herrschaft der Verbände?* (Stuttgart, 1963, orig. 1955), at 32; also Ritter, “Der kooperative Staat: Bemerkungen zum Verhältnis von Staat und Wirtschaft”, 104 AöR (1979), 389, at 410; Scharpf, “Versuch über die Demokratie im verhandelnden Staat”, in Czada and Schmidt (Eds.), *Verhandlungsdemokratie, Interessenvermittlung, Regierbarkeit: Festschrift für Gerhard Lehmbruch* (Opladen, 1993), pp. 25–50; Grande, “Auflösung, Modernisierung oder Transformation? Zum Wandel des modernen Staates in Europa”, in Grande and Prätorius (Eds.), *Modernisierung des Staates?* (Baden-Baden, 1997) p. 45, at 57. Hence, in economic politics, high-ranking representatives of the administration and of associations typically negotiate results that are no longer comprehensible for the parliamentary bodies of the territorial units involved. Parliaments can only accept these results or disavow their representatives. Also, Parliamentary bills are negotiated between political departments and the lobbies and are presented to parliament without alternatives. In that situation, either parliamentary control is realized and complicates or prevents the negotiations, or the negotiations are successful and invalidate the democratic procedure (Benz, “Verhandlungssysteme und Mehrebenenverflechtung im kooperativen Staat”, in Benz and Seibel (Eds.), *Regierungssystem und Verwaltungspolitik: Beiträge zu Ehren von Thomas Ellwein* (Opladen, 1995) p. 83, at 90–91). See also von Beyme, “Niedergang der Parlamente”, 53 *Internationale Politik* (Opladen, 1998), 21, at 29; von Beyme, *Die Parlamentarische Demokratie: Entstehung und Funktionsweise 1789–1999* (Opladen, 1999), at pp. 537–538 (on “disempowerment” of the national parliament solely by the amount of issues); Grimm, “Das Grundgesetz nach 50 Jahren – Versuch einer staatsrechtlichen Würdigung”, in Bundesministerium des Innern (Ed.), *Bewährung und Herausforderung: Die Verfassung der Zukunft* (Opladen, 1999), p. 39, at 57–58; Klein, “Staat der Bürger: Zum 50. Jahrestag des Grundgesetzes”, in *ibid.* p. 133, at 139 (marginalization of parliament by networks and informal agreements).

10. See the relevant contributions in Holznagel, Grünwald and Hanssmann (Eds.), *Elektronische Demokratie: Bürgerbeteiligung per Internet zwischen Wissenschaft und Praxis*

- a final, crucial factor is the transformation of domestic democracies through globalization and global governance. I will discuss this last factor in more detail in the next section.

### 1.3. *Anti-democratic effects of globalization and compensatory transnational democracy*

The European discussion on democracy neglects the global dimension of the problem.<sup>11</sup> Globalization undermines the premise of traditional democratic theory, namely that democratic States are comparatively closed, clearly definable entities.<sup>12</sup> In contrast, economic, political, military and legal problems, relations and power structures are becoming increasingly global. This has led to three democratic deficiencies.

The first deficiency stems from the fact that – because of global interdependencies – State activities have become more far-reaching and more extra-territorial. This means that political decisions (e.g. on tax reduction, raising environmental standards, building nuclear plants) affect people in other States, people who have not elected the decision-makers and can in no way control them.

The second aspect is that the transnational character of issues, and the mobility and interaction of individuals, firms, and NGOs (despite the increasingly extraterritorial effects of regulation) has on the whole reduced the power of the nation state to tackle and solve problems by itself. In terms of democracy, this general loss of effectiveness reduces the effectiveness of self-determination, or democratic output. So here we face a kind of *indirect* decline of democracy.<sup>13</sup>

The third deficiency lies in the lack of any democratic mandate for or control of non-state decision-makers. In order to regain control, States have to co-operate within international organizations, through bilateral and multilateral treaties and so forth. But these conventional methods of global governance aggravate the democratic deficit, because the link between voters and

(Munich, 2001). On the effects of the internet on state authority and parliamentarism see the excellent analysis by Engel, “Das Internet und der Nationalstaat”, 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1999), 353, esp. at 374–389.

11. See in detail Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin, 2001), at pp. 743–751.

12. Held, “Democracy, the Nation-State and the Global System”, in Held, *Political Theory Today* (Cambridge, 1991), p. 197, at 199; Walker, “On the Spatiotemporal Conditions of Democratic Practice”, 16 *Alternatives: Social Transformation and Humane Governance* (1991), 243–261; McGrew, “Demokratie ohne Grenzen?”, in Beck (Ed.), *Politik der Globalisierung* (Frankfurt a.M., 1998), p. 374, at 381–383.

13. Sandel, *Democracy's Discontent: America in Search of a Public Policy* (Cambridge, 1996), at p. 202.

decision-makers is loosened. Non-state law-making is – not only in the EU, but in all international institutions – law-making by the executive, not by parliament.<sup>14</sup> The remaining formal power of parliaments to ratify international treaties is further undermined by law-making of the UN Security-Council, substituting ordinary treaty-making on important issues such as criminal tribunals or combating terrorism.<sup>15</sup> Moreover, the complexity of the process blurs the lines of responsibility between the actors in international regimes and further threatens the functioning of the institutions of control and call-back.<sup>16</sup>

The conclusion to draw from all this is that if we want to preserve a minimum level of democratic governance, then we have to move beyond the State and establish compensatory, transnational democratic structures.<sup>17</sup> To that end, models of cosmopolitan democracy have already been developed. They are of course quite idealistic, if not utopian.

But this does not concern us here; as the purpose is only to point out that the so-called “democratic deficit” is a global, rather than an exclusively European problem. This observation is important in two respects: first, it puts European deficiencies into perspective. These deficiencies are only one (small) part of a more general trend. Second, it shows that lowering our democratic standards and accepting the status quo in Europe is not a wise course to take, because this could create an unfortunate precedent. The overall threat to democracy does require creative strategies, unless we are to give up on the idea of democracy altogether.

#### 1.4. *European variations are justified*

The preceding observation does not prevent the accommodation of supranational variations in democratic governance. On the other hand, variations may not be deviations *ad libitum*, amounting to a deformation of democracy. In this context two elements of European governance are decisive:

14. See Stein, “International Integration and Democracy: No Love at first sight”, 95 AJIL (2001), 489–534, on democracy-legitimacy deficits in the WHO, WTO, NAFTA and EU.

15. The International Convention for the Suppression of the Financing of Terrorism of 9 Dec. 1999, 39 ILM (2000) 270 et seq., not yet in force, has been reduplicated and made compulsory by SC Res. 1373 (2001), 40 ILM (2001) 1278 et seq.

16. Scharpf, “Demokratie in der transnationalen Politik”, in Beck op. cit. *supra* note 12, p. 228, at 230; Goodman, “Die Europäische Union: Neue Demokratieformen jenseits des Nationalstaates”, in *ibid.*, p. 331, at 350; Kaiser, “Globalisierung als Problem der Demokratie”, 53 *Internationale Politik* (1998), 3, at 4.

17. “Democracy within a nation-state requires democracy within a network of intersecting international forces and relations. This is the meaning of democratization today.” Held, *supra* note 12, at 232.

- the “carrier” or the subject of democracy is multinational and not a “people” in the traditional sense;
- European governance has a network-structure, consisting of horizontal layers and vertical segments. The network is formed by European institutions and the Member States acting both within those institutions (as a part of them) and outside of the EU. Democratic legitimacy potentially flows from all layers and segments taken together, not from only one of them.

1.5. *The 2003 Convention’s model of European democracy: Equality, representation, and participation*

Ideally, the preceding general considerations should have informed the Convention’s Proposals on democratic governance. More concretely, the Convention was guided by the Laeken Declaration, which spelled out the Convention’s mandate. In Laeken, the question of how to increase the democratic legitimacy and transparency of the institutions was a central issue.<sup>18</sup> In reaction, the Draft Constitution’s Preface proclaims that the “Convention has identified responses to the questions put in the Laeken declaration: ... it proposes measures to increase democracy, transparency and efficiency of the European Union, by developing the contribution of national Parliaments to the legitimacy of the European design, by simplifying the decision-making processes, and by making the functioning of the European Institutions more transparent and comprehensible.” The following analysis of the procedural and institutional reforms proposed in the Draft Constitution should reveal whether this promise has been fulfilled.

Most remarkably, one of the few genuine novelties of the 2003 Draft Constitution is the Introduction of a new Title VI “The Democratic Life of the Union”. This title was not elaborated by a working group, but originates directly from the Praesidium,<sup>19</sup> and in its final version also embodies proposals for amendment by Convention members reacting to the Praesidium’s first draft.<sup>20</sup> The new title contains three principles of democracy, which are actually novel, namely democratic equality, representative democracy, and participatory democracy. Moreover, the title reproduces provisions found in the existing treaties, but with more or less substantial amendments, such as Article 48 on the European Ombudsman. Most importantly, the new title con-

18. Laeken Declaration on the Future of the European Union of 15 Dec. 2001, Part I: “Europe at the crossroads”, with the sub-title: “The democratic challenge facing Europe”. Part II: Challenges and Reforms in Renewed Union: “The Union need to become more democratic, more transparent and more efficient.” [gov.be/europ/en\\_decla\\_laken.htm](http://gov.be/europ/en_decla_laken.htm).

19. CONV 650/03 of 2 April 2003, Praesidium, The democratic life of the Union.

20. A total of 235 amendments concerning the Praesidium’s draft articles on the democratic life of the Union were submitted (see summary sheet CONV 670/03).

tains a general clause on transparency (Art. 49) and thereby highlights the centrality of this principle for the functioning of democracy (see in detail *infra*, 2.3.).

I will here concentrate on the new democratic principles. Article 44, the *principle of democratic equality*, runs: “In all its activities, the Union shall observe the principle of the equality of citizens. All shall receive equal attention from the Union’s Institutions.” This article is an important manifestation of the Praesidium’s general philosophy with regard to the institutional design of the Union. During the course of the Convention’s discussion on institutional issues, the President cited three guiding principles on which all proposals by the Praesidium during the Convention were based. The first of these was the principle of equality of citizens and of Member States.<sup>21</sup> The fact that only equality of citizens is explicitly mentioned in Article 44 reflects an individualistic concept of democracy, and – in my view correctly – leaves out the idea of equality of States, which is more a federalist than a democratic concern.<sup>22</sup> In the plenary debate, the idea of equality of citizens was uncontested.<sup>23</sup> Notwithstanding this grand formulation, equality of citizens in relation to the European institutions is actually *not realized* in the concrete institutional provisions of the Draft Constitution: the citizens are not equally represented in the Parliament (*infra*, 2.1.1.), and in the Council, only decisions taken by qualified majority must be carried by the majority of States and by three fifths of the population (*infra*, 2.1.2.).

Article 45 enshrines the *principle of representative democracy*. This principle does not figure in the Praesidium’s first draft,<sup>24</sup> but was put forward by the Praesidium at a later stage, taking into account Convention members’ proposals. The mechanisms of representative democracy might be usefully complemented or modified by elements of direct democracy. To that end, citizens’ referendums with regard to European laws were suggested by a number of Convention members.<sup>25</sup> However, the proposal to constitu-

21. See e.g. CONV 696/03, Summary Report of the Plenary Session of 24/25 Aug., Presentation of the new draft Articles, at 2.

22. The most significant proposals for amendments by Convention members concerned the introduction of the concept of “equality of Member States” as a complement, which was ultimately rejected.

23. See CONV 696/03 of 30 April 2003, Summary Report of the Plenary Session of 24/25 Aug., Presentation of the new draft Articles, at 5.

24. CONV 650/03 of 2 April 2003.

25. Kaufmann, Voggenhuber; Lichtenberger, Einem, Lamassoure (see the respective amendment forms in [european-convention.eu.int/amendemTrait.asp?lang=EN](http://european-convention.eu.int/amendemTrait.asp?lang=EN); on Art. 45 of the final Draft: [european-convention.eu.int/amendments.asp?content=3599&lang=EN](http://european-convention.eu.int/amendments.asp?content=3599&lang=EN); on Art. 46: [european-convention.eu.int/amendments.asp?content=34&lang=EN](http://european-convention.eu.int/amendments.asp?content=34&lang=EN) (visited on 18 Sept. 2003). See also Verbatim Record of the Convention’s plenary session of 24 April 2003, at 32–33, 37, 46, 52, 54, 57 (Athanasia, Kirkhoe, Lamassoure, Meyer, Severin, Abitbol). [www.europarl.eu.int/europe2004/textes/verbatim\\_030424.htm](http://www.europarl.eu.int/europe2004/textes/verbatim_030424.htm).

tutionalize the possibility of holding referendums was not taken up. (A different question is the ratification of the Constitutional Treaty itself by a European referendum, which was even more intensely debated and which likewise does not figure in the Draft Constitution's provisions on ratification). According to Article 45(2) Draft Constitution, the European citizens are directly represented at Union level in the EP, whereas Member States are represented in the European Council and in the Council of Ministers. This clause introduces the Member States, which were left out in the previous Article, and reflects the common idea of *dual legitimacy of the Union*, based on the citizens and the States (see also Preamble, final clause and Art. 1(1) of the Draft Constitution).

Article 46 spells out the principle of *participatory democracy*. The purpose of this article is, according to the Praesidium's comment, "to provide a framework and content for the dialogue which is largely already in place between the institutions and civil society."<sup>26</sup> Article 46(1) Draft Constitution holds that the Union Institutions shall "give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action." This section reflects the ideal of *deliberative democracy*, which attributes much weight to the process of public deliberation as a crucial factor of democracy (see also *infra*, 4.1.). The most tangible provision of the new title on democratic life, and actually one of the few real novelties presented by the 2003 Draft Constitution, is the clause on the *citizens' initiative* (Art. 46(4)). The citizens' initiative was introduced at a very late stage upon intervention of two groups of Convention members.<sup>27</sup> The pertinent provision reads: "No less than one million citizens coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. A European law shall determine the provisions for the specific procedures and conditions required for such a citizens' initiative." The most important specifications to be made in such a European law would be the number of Member States required (e.g., eight Member States) and the minimum number of citizens coming from one single Member State, in order to maintain a feder-

26. CONV 650/03, at 8. The article was complemented, on suggestion of numerous Convention members, by an article on the social dialogue (Art. 47).

27. See CONV 670/03 of 15 April 2003, Summary sheet on the proposals for amendments relating to the democratic life of the Union: Draft articles for Part One of the Constitution, Title VI; CONV 798/03 of 17 June 2003, Summary Report of the plenary session of 5 June, at 3; CONV 811/03 of 12 June 2003, Revised Texts on democratic life put forward by the Praesidium, following consultations with the component groups and in the light of their suggested amendments, with a view to reaching consensus at the plenary session of 13 June; Verbatim Record of the Convention's plenary session of 12 June 2003, at 4 [www.europarl.eu.int/europe2004/textes/verbatim\\_030612.htm](http://www.europarl.eu.int/europe2004/textes/verbatim_030612.htm)).



alist balance. The citizen's initiative modestly softens the otherwise strictly representative character of European democracy. Independent of actual future resort to that instrument, the mere option might become an important symbol of genuine, bottom-up democracy. It seems apt to overcome the citizens' feeling of powerlessness *vis-à-vis* a gigantic European bureaucracy, while at the same time preserving the Commission's monopoly of legislative initiative.

## 2. Institutional and functional aspects of European democracy

### 2.1. *Composition and powers of the relevant European institutions*

The Laeken Declaration stressed that the question of how the democratic legitimacy and transparency of the present institutions could be increased "is valid for the three institutions", namely the European Parliament, the Council, and the Commission.<sup>28</sup> In the following section, the democratic credentials of the European institutions are examined.

#### 2.1.1. *The European Parliament*<sup>29</sup>

In his presentation of the Final Draft Constitution to the European Council in Thessaloniki, the President of the Convention found that the European Parliament was "the great winner of our Constitution."<sup>30</sup> We will see that this assertion is correct.

##### 2.1.1.1. *Composition*

Currently, the European Parliament (EP) is not composed according to the maxim "one man – one vote" (see Art. 190 EC). The idea of "one man – one vote" requires most of all that each vote has an equal *impact* on the election result. This condition is satisfied in proportional electoral systems, in which electors vote for a party list and where the seats are distributed according to the distribution of the votes cast. In an electoral system of majority voting ("first-past-the post"), the equality of the votes' impact is guaranteed if the relevant constituencies are composed of an equal number of voters. If there is no uniform electoral system at all (such as on the European level), the

28. Laeken Declaration of 15 Dec. 2001, *supra* note 18, Part II, under subtitle 3.

29. For an overview, see Kreppel, *The European Parliament and Supranational Party System: A Study in Institutional Development* (Cambridge, 2002).

30. Rapport oral présenté au Conseil Européen de Thessalonique par Giscard d'Estaing, Président de la Convention Européenne, 20 Juin 2003, at 11 ([european-convention.eu.int/docs/speeches/9604.pdf](http://european-convention.eu.int/docs/speeches/9604.pdf), visited 18 Sept. 2003).

equality of the impact of the votes and thereby the equality of representation of the Parliament is not granted. A uniform electoral procedure, as foreseen by the never-implemented Article 190(4) EC, is lacking. The “representativeness” of the EP is therefore distorted.<sup>31</sup> Moreover, elections to the EP are, due to the lack of a uniform electoral procedure and due to their connection to national rather than European politics, only “second-order” national elections;<sup>32</sup> they are not about past and future European policy choices, but about the performance of national governments.

The relevant articles of the 2003 Draft Constitution are Article 19, which foresees “direct universal suffrage”<sup>33</sup> and a specification and completion in the institutional part, Article III-232 (“Election of the Members of the EP”).<sup>34</sup> Article 19 of the Draft Constitution does improve the law as it stands. It specifies that the EP is elected in “free and secret ballot”, and thereby incorporates two classic principles of democratic elections. It is, however, significant, that the third classic principle, namely “equal ballot” is missing. Also, Article 19(2) limits the number of MEPs to 736.<sup>35</sup> Most importantly,

31. Even leaving aside the extreme case of Luxembourg, the vote of one citizen of the next under-populated country, Ireland, still weighs 3 and a half times as much as a German vote. One German Euro MP represents 820,000 Germans; an Irish Euro MP represents 240,000 Irishmen, and a Luxembourg representative represents 7000 Luxembourgers; the European average is 600,000 citizens per representative. Figures as of 1995, see the table in Føllesdahl, “Democracy and Federalism in the European Union”, in Føllesdahl and Koslowski (Eds.), *Democracy and the European Union* (Berlin, 1997), p. 231, at 234. Put differently: Germany has 21.97 % of the EU population and the country has 15.81 % of the seats in the EP. Luxembourg accounts for 0.11 % of the population and 0.96 % of the seats. Ireland accounts for 0.97 % of the population and 2.40 % of the seats (survey of the *Konrad-Adenauer-Stiftung* (Neuss and Hilz), “Deutsche personelle Präsenz in der EU-Kommission”, November 1999, reprinted in 279 *Frankfurter Allgemeine Zeitung* (30 Nov. 1999), at 29. See also the discussion and figures in Karlsson, *supra* note 4, at 93–99.

32. Katz, “Models of Democracy”, 2/1 *European Union Politics* (2001), 53, at 56.

33. Art. 19(2): “The EP shall be elected by direct universal suffrage of European citizens on free and secret ballot for a term of five years. Its members shall not exceed seven hundred and thirty-six in number. Representation of European citizens shall be degressively proportional, with a minimum threshold of four members per Member State. Sufficiently in advance of the European Parliamentary elections in 2009, and, as necessary thereafter for further elections, the European Council shall adopt by unanimity, on the basis of a proposal from the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles set out above.”

34. Art. III-232(1): “A European law or framework law of the Council of Ministers shall establish the necessary measures for the election of the Members of the European Parliament by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. The Council of Ministers shall act unanimously on a proposal from and after obtaining the consent of the European Parliament, which shall act by a majority of its component members. This law or framework law shall not enter into force until it has been approved by the Member States in accordance with their respective constitutional requirements.”

35. Art. 2(3) of the Nice Protocol on the Enlargement of the European Union of 26 Feb.

the new provision requires that “[r]epresentation of European citizens shall be degressively proportional, with a minimum threshold of four members per Member State.” This is a useful specification of the current provision of Article 190(2) EC, which only asks for “appropriate representation of the peoples of the States brought together in the Community.” Moreover, the new provision – in my view correctly – focuses on “citizens” as the relevant starting-point of democracy, not on “peoples”. It also makes clear that the principle “one man – one vote” will not be realized in Parliament, but will continue to be curtailed by the opposing principle of representation of States, which takes into account the federative nature of the Union.

Currently, the number of representatives elected in each Member States for the 2004-2009 term is fixed by the Nice Protocol on Enlargement<sup>36</sup> and by Declaration No. 20 on Enlargement.<sup>37</sup> The Draft Constitution only slightly modifies the Nice figures in a Protocol on the Representation of Citizens in the European Parliament, in order to accommodate an eventual accession of Bulgaria and Romania.<sup>38</sup> For the 2009 elections, the overdue reform of the electoral procedure must be effected. To that end, the Draft Constitution asks for a “European law or European framework law of the Council of Ministers.” The substance of this projected law does not deviate from the law as it stands. As already foreseen in Article 190(4) EC, the norms should stipulate either “a uniform procedure in all Member States *or* [suffrage] in accordance with principles common to all Member States”. Moreover, the “European electoral law” would have to be ratified by the Member States (Art. III-232 Draft Constitution; see likewise Art. 190(4) EC). It would therefore be, technically, a treaty under international law. To sum up, the Draft Constitution’s improvements regarding the creation of the EP appear rather modest.

#### 2.1.1.2. *Functions*

Article 19(1) Draft Constitution for the first time clearly spells out the EP’s functions: legislation (jointly with the Council of Ministers), budgetary functions, political control, and consultation. In the following, those tasks which are arguably most important, namely legislation and political control,<sup>39</sup> will be treated in more detail. As for the adoption of the Union’s annual budget,

2001 required only a total number “as close as possible to 732” MEPs (O.J. 2001, C 80/49, at 50).

36. O.J. 2001, C 80/49.

37. O.J. 2001, C 80/80.

38. Protocol on the Representation of Citizens in the European Parliament and the Weighting of Votes in the European Council and the Council of Ministers, CONV 850 /03, at 232.

39. With regard to the EP, see Pescatore, “Les exigences de la démocratie et la légitimité de la Communauté européenne”, 10 CDE (1974), 499, at 510.

the Draft Constitution confirms the dual budgetary authority of the EP and the Council, but greatly simplifies the budgetary procedure. It also abolishes the distinction between compulsory and non-compulsory expenditure, which was obsolete in any case (see Art. III-310 Draft Constitution). As regards parliamentary consultation, the Draft Constitution's requirements are similar to present law.<sup>40</sup>

*Legislation.* During the entire process of integration, the EP's legislative powers<sup>41</sup> have been strengthened steadily, most dramatically with the introduction of the codecision procedure, established by the Treaty of Maastricht (now Art. 251 EC). The weaker forms of parliamentary participation in legislation are within procedures of consultation, cooperation and assent.<sup>42</sup> Within the codecision procedure, parliament is an actual *co-legislator* alongside the Council. Currently, the codecision procedure is required for legislation under more than 30 treaty provisions and extends, for example, to the following important fields: anti-discrimination legislation under Article 12 EC, legislation on the right to move and to reside under Article 18 EC, provisions on the freedom of movement for workers under Article 40 EC. Considering the text of the treaties, the codecision procedure appears to be the regular mode of law-making. However, in reality only approximately 25 per cent of EU legislation is adopted with the codecision procedure.<sup>43</sup>

40. Law-making with consultation of the EP is provided for, e.g. with regard to the Union's resources, citizenship, competition, approximation of legislation, harmonization of indirect taxation (Art. III-62), economic and monetary policy, social policy, environment, transport, immigration, police cooperation, and for the conclusion of some international agreements (Art. III-227(7)). The EP must be "informed" under Art. III-86(3) (Economic and Financial Committee); Art. III-76(10) (measures combating excessive government deficits).

41. Cf. Craig, "Democracy and rulemaking within the EC: An empirical and normative assessment", in Craig and Harlow (Eds.), *Lawmaking in the European Union* (London, 1998) 33, at 35–43 (also published as: 2/97 *Harvard Jean Monnet Working Paper* (1997)); Crombez, Steunenberg and Corbett, "Understanding the EU legislative process: Political scientists' and practitioners' perspectives", 1 *European Union Politics* (2000), 363–383.

42. Simple *parliamentary consultation* of the EP is foreseen in e.g. in Art. 37(2) 3rd indent EC, and Art. 175 EC (random examples). Within the *cooperation procedure* (Art. 252 EC), the Parliament may influence Council decisions by exercising its power of amendment. The scope of the cooperation procedure is limited to Economic and Monetary Union (Arts. 99; 102(2); 103(2); 106(2) EC). However, under these treaty articles, no important legislation has been taken. Therefore, the cooperation procedure is in practice negligible. Within the *procedure of assent*, an Act cannot be definitely adopted without parliament's agreement. Parliamentary assent is provided for Acts concerning the European Central Bank and certain funds (Arts. 105(6); 107(5); 161 EC), in Art. 190(4) EC (uniform electoral procedure), in Art. 300(3) EC (certain international agreements) and in Art. 49 TEU (accession of new Member States).

43. According to EP statistics on legislative activities in the period from October 1997 to December 2003, 1101 Acts were adopted upon mere consultation with the EP, 70 Acts through the co-operation procedure, 460 Acts with the codecision procedure and 85 Acts with EP assent ([www.db.europarl.eu.int/oeil/oeil4.FR211\\_en](http://www.db.europarl.eu.int/oeil/oeil4.FR211_en)).

The Draft Constitution's provisions on legislation and on parliamentary participation therein are Article 33 ("Legislative Acts") and Article III-302. Article 33(1) sentence 1 holds that "European laws [i.e. regulations in current terminology<sup>44</sup>] and framework laws [i.e. directives in current terminology] shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council of Ministers under the ordinary legislative procedure as set out in Article III-302." Article III-302 builds on the codecision procedure of Article 251 EC, but simplifies it and accentuates the EP's role as a genuine co-legislator on an equal footing with the Council. The label "ordinary legislative procedure" promises that, under the Draft Constitution, codecision has truly become the general rule for the adoption of legislative acts. In fact, the current extremely confusing and far from transparent variety of legislative procedures is in part remedied by the Draft Constitution. The ordinary procedure is extended from about 37 domains to about 80 to 90 subject matters (depending on how one defines them).<sup>45</sup> The list of exceptions (special legislative procedures) is limited to a dozen subject matters which either have an impact on the Member States' constitutional order (such as European citizenship) or which are politically sensitive for some Member States (e.g. certain aspects of social policy).<sup>46</sup>

The new legislative procedure is based on the ground work of the Working Group IX on Simplification,<sup>47</sup> on which a broad consensus emerged in the plenary assembly.<sup>48</sup> The essential components of the ordinary legislative procedure are: (1) parity between the EP and the Council as the "two arms of the legislative authority",<sup>49</sup> (2) the legislative initiative of the Commission, and (3) (relative) transparency of the procedure.<sup>50</sup> Technically, the present codecision procedure has *not* been modified. Article III-302 Draft Constitution requires a (simple) "majority" instead of "absolute majority" (see Art. 251 EC) of the EP (in second reading: "of its component members"; in the conciliation phase: "of the votes cast"). This is merely a verbal change. In a vote choosing between two options, the majority is perforce an absolute ma-

44. See Art. 32 of the Draft Constitution.

45. Rapport oral par Giscard d'Estaing, *supra* note 30, at 11.

46. *Id.*, at 12.

47. See CONV 424/02, WG IX 13, Final Report of the Working Group IX on Simplification of 29 Nov. 2002, discussed in the plenary session of 15 Dec. 2002. See also CONV 449/02 of 13 Dec. 2002, Summary Report on the plenary session of 5/6 Dec. 2002, at 1–12.

48. CONV 449/02 of 13 Dec. 2002, Summary Report on the plenary session of 5/6 Dec. 2002, at 4. See also CONV 630/03 of 21 March 2003, Summary Report on the plenary session, Brussels 17 and 18 March 2003, at 2.

49. CONV 724/03 of 26 May 2003, Draft Constitution, Volume I – Revised text of Part One, at 90 (Praesidium's Comments).

50. Cf. CONV 571/03 of 26 Feb. 2003, The Praesidium: Draft of Articles 24 to 33 of the Constitutional Treaty, at 2.

jority. As regards the scope of codecision/ordinary legislation, it is noteworthy that the procedure was extended to important subject matters in which legislation is currently passed with weaker participation of the EP, including the liberalization of services, intellectual property, common agricultural policy, asylum and immigration.<sup>51</sup>

When assessing the democratic character of European law-making, it is important to note that the real influence of domestic parliaments in domestic law-making does not live up to the parliamentary ideal. In the Member States, legislation is, in reality, dominated by the executive,<sup>52</sup> which is often dependent on expert votes about eminently technical issues, and side-stepped

51. See CONV 727/03 of 27 May 2003, Draft sections of Part Three with comments, Annex III, at 116 et seq.: List of legal bases for which the Draft Constitution changes the adoption procedure in comparison with the present Treaties.

52. In France, laws are made in a *collaboration inégale* of the executive and parliament (Pactet, *Institutions politiques, Droit constitutionnel* (Paris, 1998), at pp. 435–460). In England, it has been argued that “the efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is the cabinet” (Bagehot, *The English Constitution*, reprinted in *The World’s Classics* (Neuwied, 1936, 1st ed. 1867), at p. 9). The English majority principle has as a consequence that the executive is supported by a very strong parliamentary majority. This leads, according to Lord Hailsham, to an “elective dictatorship”, that is a situation in which the executive controls the legislative (Lord Hailsham, “Current Topics: ‘Elective Dictatorship’”, in 120 *The Solicitors’ Journal* (1976), 693; Barnett, *Constitutional and Administrative Law* (London, 1998), at pp. 142–143). See on the division of law-making power between government and parliament in other Member States part I 3 of the Danish Constitution of 5 June 1953 (folketing and King); Art. 26 of the Greek Constitution of 7 June 1975 (parliament and president); Art. 34, 46 of the Luxembourg Constitution of 17 Oct. 1868 (archeduke and parliament); Art. 81 of the Dutch Constitution of 17 Feb. 1983 (government and parliament); power to delegate from parliament to government in Art. 66 II and Art. 82 of the Spanish Constitution of 29 Dec. 1978; Art. 70 and 76 et seq. of the Italian Constitution of 22 Dec. 1947. See also the provisions in Art. 164 and Art. 201 lit. d) of the Portuguese Constitution of 2 April 1976; Art. 18 of the Finnish Constitution of 17 July 1919/1994; Art. 36 of the Belgian Constitution of 17 Feb. 1994. On the other hand the Irish parliament has an explicit monopoly of law-making (Art. 15,2,1 of the Irish Constitution of 1 July 1937); see also Art. 24 of the Austrian Constitution of 10 Nov. 1920 (law-making by the National Council and the Federal Council). Another case in point is the German practice of the *Zustimmungsverordnung*, a system of law-making by the executive authority with the approval of parliament. *Zustimmungsverordnungen* are issued in cases which are important enough to require parliamentary participation, but which still need flexible and quick treatment. See German Federal Constitutional Court, BVerfGE 8, 274, 321–322 (1958); German Federal Administrative Court, BVerwGE 57, 130, 139–140 (1978). In most parliamentary democracies, actors not belonging to the executive can hardly influence the legislative process in a significant manner (De Winter, “The Role of Parliament in Government Formation and Resignation”, in Döring (Ed.), *Parliaments and Majority Rule in Western Europe* (New York, 1995) p. 115, at 148; see also Laver and Shepsle, *Making and Breaking Governments* (Cambridge (Mass.), 1996), at pp. 3–4, 280: “Whatever else it might be, parliamentary democracy is not rule by the legislature.”

by bargaining between the government and societal actors. But even taking these factors into account, the EP's influence on European legislation is still less than an "ordinary" parliament's influence on its domestic law-making. Even with the codecision/ordinary legislative procedure, the EP is *not the sole or principal legislator*, but shares legislative power with the Council.

*Political control.* Within the EU, executive powers are vested in the Commission and in the Council. Consequently, one should expect parliamentary control to extend to both institutions. An element of parliamentary control is already present in parliamentary participation in appointing members of other constitutional bodies. These *creative powers* of the EP are somewhat underdeveloped in comparison to the parallel functions of domestic parliaments. Under current Article 214 EC, the European Parliament must approve the nomination of the President of the European Commission (made by the governments of the Member States) and must also approve the nominated Commission as a body. Article 26 of the 2003 Draft Constitution does not substantially alter this procedure. Article 26(1) Draft Constitution merely replaces the governments of the Member States by "the European Council". It specifies that the candidate for Presidency shall be elected by the EP "by a majority of its members". A novelty is the provision for a second round: "If this candidate does not receive the required majority support, the European Council shall within one month propose a new candidate to the EP, following the same procedure." Article 26(2) Draft Constitution formulates that the President and the persons nominated for the College, including (this is new) the Union Minister for Foreign Affairs and the non-voting Commissioners "shall be submitted collectively to a vote of approval by the EP." The substitution of the current term "as a body" by the expression "collectively" implies no material change.

As for the *Council*, the EP has no influence whatsoever on its composition. However, in most Member States, governments are not formally invested by their respective parliaments either.<sup>53</sup>

EP *ex post control of the Commission* is exercised by giving discharge in respect of the implementation of the budget (Art. 276 EC; no material modi-

53. See for France Pactet, *supra* note 52, at 414. In Austria as well, the president is elected by the people (Art. 60 of the Austrian Constitution), the Chancellor is appointed by the president and merely presented to parliament (Art. 70(1) and (3)). In England, the appointment of the Prime Minister is a royal prerogative. Due to a constitutional convention, the Queen must appoint the leader of the majority party in the House of Commons (Barnett, *supra* note 52, at 180). In Spain, the King proposes a candidate for the presidency after consulting parliament; parliament has to grant confidence with an absolute majority (Art. 99(1) and (3) of the Spanish Constitution); the rest of the government is appointed by the King on suggestion of the president (Art. 100). See in terms of comparative government de Winter, *supra* note 52, at 115–151, in particular at 147.

fications proposed in Art. III-315 Draft Constitution) and by the discussion of the general annual reports submitted by the Commission (Art. 200 EC; Art. III-242 Draft Constitution) and by various other instruments.<sup>54</sup> The most important instrument of control is the *motion of censure* against the activities of the Commission (Art. 201 EC). The Draft Constitution foresees the censure motion in a general clause in Part One (Art. 25(5)) and spells out the institutional details in Part Three (Art. III-243). These proposals do not alter the law as it stands. (A mere linguistic improvement is the term “majority of its [the EPs] component members” instead of “majority of its members”).<sup>55</sup>

The *Council*, on the other hand, is not legally accountable to the EP, although it does function as part of the “European government”. The Draft Constitution has not introduced any accountability here. It is even arguable that such accountability would not only be unfeasible, given the current power constellation, but even counterproductive, because Council members, being members of national governments, must be primarily accountable to their national constituencies. This link is now clearly expressed in Article 45(2) of the 2003 Draft Constitution, which holds: “Member States are represented in the European Council and in the Council of Ministers by their governments, themselves accountable to national parliaments, elected by their citizens.” In any case, the lack of accountability of the Council to the EP is put in perspective by the observation, again, that – in fact – national parliaments rarely make use of their existing powers to control their own governments, for both political and technical reasons.<sup>56</sup>

54. See Art. 197(3) EC, and Art. III-239(1) Draft Constitution (interpellation); Art. 230(3) EC, and Art. 232 EC; Art. III-270(2), and Art. III-272(1) Draft Constitution (standing of the EP); Art. 193 EC, and Art. III-235 Draft Constitution (temporary committee of inquiry).

55. The censure motion was not discussed in the relevant Convention’s plenary sessions on 4 and 10/11 July 2003. The final Draft Constitution left the Presidency’s proposal (CONV 691/03) virtually unchanged.

56. In reality, in the Member States, parliamentary control is exercised by the parliamentary opposition, not by parliament as a whole. Studies in comparative government show that, in most European countries, the executive branches and the administrations have become increasingly powerful and the activities of the opposition are hampered. Moreover, systematic control is very costly and does not impress voters. As a result, parliamentary control is often uncoordinated and fragmentary. True, it does reveal extreme and scandalous administrative behaviour, but on the whole, real parliamentary control is minimal. Laver and Shepsle, *supra* note 52, at 281; also Majone, “The European Community as a Regulatory State”, V-1 *Collected Courses of the Academy of European Law* (1994), 321, at 401; De Winter, *supra* note 52, at 147; Lord, *supra* note 4, at 65.



### 2.1.2. *The Council of Ministers*

#### 2.1.2.1. *The law as it stands*

The Council of Ministers is the Community's most powerful institution and its primary law-maker (on parity with the EP). Council members are members of national governments and enjoy some degree of democratic legitimacy via national elections. However, an electoral connection between all Council members and all European citizens is lacking. Moreover, Council decision-making appears to suffer from two major democratic deficiencies: unanimity voting and an extreme distortion of citizens' representation, running counter to the principle "one man – one vote".

The normal modus of decision-making in the Council, especially in important issues, is currently by *unanimity*.<sup>57</sup> Democracy, however, is normally associated with majority-voting. Therefore, the current dominance of consensual decision-making in the Union is often considered as undemocratic and as a manifestation of the intergovernmental character of the Union, as

57. The treaties have evolved as follows: in the original EEC Treaty, 47 articles required a unanimous decision of the Council, 44 articles required a qualified majority vote and one article asked for a simple majority decision. After revision by the Single European Act of 1986, 48 articles required unanimity, 48 articles provided for a qualified majority vote, one article required a simple majority decision and 10 articles required procedures of co-operation (common position of the Council with qualified majority, after rejection by the EP unanimity in Council required). With the Treaty of Maastricht of 1992: 48 articles required unanimity, 48 articles required qualified majority, 16 articles provided for procedures of co-operation and 14 articles required a codecision of the EP, where the Council decides with a qualified majority (former Art. 189 lit. b) EC, now Art. 251 EC), (figures according to König, *Europa auf dem Weg zum Mehrheitssystem* (Opladen, 1997), at p. 74). Those law-making procedures which involve the EP more intensely: procedures of *co-operation* (since the Single European Act of 1986 in Art. 149 EEC, after Maastricht in Art. 189 lit. c) EC, now Art. 252 EC – currently applicable only in four cases, most notably in the field of the Economic and Monetary Union) and the *codecision* procedure (Art. 251 EC, applicable in 31 areas) all require a qualified majority in the Council in all phases of decision-making (exception: unanimity for the Council-decision after rejection of the proposal by the EP in the procedure of co-operation, Art. 252 EC). With the Treaty of Amsterdam of 1997, a new Title IV (Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons) was created. Here, the principle of unanimity will remain operational for a period of transition of five years (Art. 67 EC). Under the Treaty of Amsterdam, about 50 situations still require unanimity. However, those articles which allow for majority-decisions are applied more frequently than those requiring a unanimous decision (König, at 87, based on empirical research for the period of 1984Bö1995). The Treaty of Nice introduced decision-making with a qualified majority in 27 additional provisions (either as a sole mode of decision-making or as an auxiliary mode). The procedures will only in part be effective from the treaty's entry into force. In part, they will come into effect only at a later moment (see the list of provisions in the annex to Doc. SEC (2001), at 99). See for a similar account: European Parliament, D-G for Research (ed.), Working Paper: Co-Governing after Maastricht: The EP's Institutional Performance 1994–1999 (1999), [www.europarl.eu.int/workingpapers/poli/pdf/104reven\\_en.pdf](http://www.europarl.eu.int/workingpapers/poli/pdf/104reven_en.pdf).

“diplomacy” in contrast to “democracy”.<sup>58</sup> This is, however, misleading – for two reasons. One is that – on the one hand – public international law is no longer strictly consensus-based, but is becoming more and more “majoritarian”. On the other hand, there are national democratic systems in which majority voting is avoided. This type of democracy is called “consociational” or “consensual” democracy.<sup>59</sup> EU decision-making, as it is currently carried out, could be interpreted as a type of consociational democracy, and hence not as anti-democratic, but just as a particular form of democracy.<sup>60</sup> This might also be one direction for future developments, and will be discussed further in the conclusion.<sup>61</sup>

*Voting-power in the Council* is not oriented to the maxim “one man – one vote”, but rather to the principle “one State – one vote”, with slight variations in weighting (Art. 205(2) EC).<sup>62</sup> Given the current apportionment of votes per Member State, majority voting in the Council does not mean that a particular decision is necessarily supported by a majority of citizens. If we take into account that the national governments usually only represent a certain percentage of their national population, and if we further take into account the comparatively low number of Council-votes per capita in the bigger Member States, a majoritarian Council decision may represent a minority of citizens. So if we want to ensure that – within the current system – Council decisions are based on the votes of at least half of the EU citizens, we have to ask for highly qualified majority votes or for unanimity.<sup>63</sup> The al-

58. Curtin, *Postnational democracy: The European Union in search of a political philosophy* (The Hague, 1997), at p. 27.

59. Steiner and Ertmann (Eds.), *Consociationalism and Corporatism in Western Europe: Still the Politics of Accommodation?* (Amsterdam, 2002).

60. Cf. Delwit, De Waele and Magnette, “Introduction: Vers un nouveau mode de parlementarisme?”, in Delwit, De Waele and Magnette (Eds.), *A quoi sert le Parlement européen?* (Brussels, 1999), p. 11, at 18 (“un parlementarisme de consensus”).

61. *Infra* section 4.2.

62. One (German, British, Italian or French) vote in the Council represents 8.1 million Germans (5.8 million British, Italians and French respectively). In comparison, one vote in the Council represents only 1.7 million Finnish, 1.2 million Irish and 0.2 million Luxembourgian citizens. Figures as of 1995 (see the table in Føllesdahl, *supra* note 31, at 234), but unchanged by Amsterdam Treaty (1997) and Nice Treaty (2001) until 1 Jan. 2005. See also the discussion and figures in Karlsson, *supra* note 4, at 93–99.

63. If, for example, each of the governments represented in Council has been elected by 55 % of its voters, a Council-decision taken with a qualified majority is supported only by 0.55 times 71.3 %, which means by 39.32 % of the voters. If the majority-coalition consists mostly of the smaller Member States, which have a much higher voting power in Council than their proportion of the EU-population, it is possible that 71.3 % of the Council’s votes will not even represent 30 % of the voters (Vaubel, “Die Macht der europäischen Mehrheiten”, 139 *Frankfurter Allgemeine Zeitung* (17 June 2000) 15, columns 2–3). It is difficult to object to this calculation by arguing that a member of Government does not only represent his electors but all his people, because this does not correspond to the reality of client-oriented politics. Vaubel

ternative is the scheme of *double majority-voting* (requiring a majority of States plus a majority of citizens), which will be discussed below (2.1.2.).

#### 2.1.2.2. *Reforms by the Draft Constitution*

Article 22(3) Draft Constitution makes *qualified majority voting* the decision-making rule (“except where the Constitution provides otherwise”). This means that within the new “ordinary legislative procedure” under Article III-302 Draft Constitution, as described above, qualified majority voting applies. The scope of qualified majority voting has been extended from about 35 to about 70 policy areas. Most importantly, issues from the former third pillar, such as judicial cooperation in criminal matters, police cooperation etc. have been removed from the unanimity zone. The most significant remaining exceptions to qualified majority voting are in the CFSP sector, the harmonization of indirect taxes, and some types of international agreements,<sup>64</sup> where unanimity voting has been preserved.

Any evaluation of the Draft Constitution’s extension of majority voting in the Council of Ministers rests on a general assessment of the pros and cons of unanimity voting. From the perspective of utility, the main concern today – with the prospect of enlargement of the Union – is that unanimity is cumbersome and is more impracticable the more members there are in the Council. From the perspective of legitimacy, however, it has been argued that an extension of the majority principle within the Council – which is desirable for practical reasons – would *aggravate* the democratic deficit<sup>65</sup> for two reasons: first, because in a system of majority voting, the defeated nation’s preferences (which have been determined through a democratic procedure) would be completely ignored; second, because a minister defeated in the vote is not legally responsible for the majority decision and need not defend it at home.

This proposition appears to be formally correct but, it is submitted, does not sufficiently take into account the real process of decision-making. In the author’s opinion, the bargaining modus of consensual decision-making behind closed doors always allows the agents to neglect their constituencies’ preferences to a certain extent as well, if this appears opportune. Moreover, national parliaments have difficulties in exercising parliamentary control over “their” member of government. It therefore seems to matter less

continues: “If you want to make sure that at least half of the EU-electors stand behind a law-making of the Council you have to ask for a qualified majority of more than 90% or unanimity.” (Translation by the author).

64. See Art. III-217(4); Art. III-225(9) Draft Constitution.

65. Weiler, “The Transformation of Europe”, 100 *The Yale Law Journal* (1991), 2403, at 2473; Kielmannsegg, “Integration und Demokratie”, in Jachtenfuchs and Kohler-Koch (Eds.), *Europäische Integration* (Opladen, 1996), p. 47, at 52.

whether they have formal powers in that respect or not. For these reasons, asserting that veto power is the “most legitimating element”<sup>66</sup> in the process of decision-making seems exaggerated.<sup>67</sup>

Instead, we have to make a trade-off between the advantages of consensual decision-making and the advantages of majority-voting. Re-phrased in terms of constitutional economics, the “calculus of consent” (Gordon Tullock and James M. Buchanan) consists in balancing two types of costs against each other:<sup>68</sup> The “internal” costs of the consensus-principle in the form of delays, of not reaching a decision at all or of representing only the lowest common denominator, against the “external” costs of majoritarian decision-making in the form of burdening the minority, provocation of societal tensions, and so on.<sup>69</sup> This roughly means that the more important the issue is (which equals high external costs for the minority), the higher internal costs we have to tolerate. And this means that fundamental issues have to be decided by consensus or by a qualified majority.<sup>70</sup>

The upshot is that we should not simply propagate the broad use of the majority principle, but design a nuanced system in which consensus and majority-voting are combined. Such a combination is – by the way – the current reality in domestic democracies, because there the formal majority voting procedures are completed by informal bargaining, and hence consensual, mechanisms.<sup>71</sup> Considering all this, the expansion of majority voting in the Draft Constitution, although it still leaves out certain politically sensitive issues, is an improvement.

The 2003 Draft Constitution substitutes the current weighting of votes by the requirement of a *double majority*. The idea of a double majority has been discussed in academic literature long before Amsterdam.<sup>72</sup> It was, during

66. Weiler, *supra* note 65, at 2473.

67. Karl Kaiser calls the idea of preserving legitimacy by unanimity as “an effective facade that conceals the ongoing erosion of democratic control over increasingly important matters” (Kaiser, “Transnational Relations as a Threat to the Democratic Process”, 25 *International Organization* (1971), 706, at 715).

68. Seminal in this regard is Buchanan and Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, 1962); see also Mueller, *Public Choice II* (Cambridge, 1989), at pp. 43–176. Application to the EC/EU by Vibert, *Europe: A Constitution for the Millennium* (Dartmouth, 1995), at pp. 129–149.

69. Terms used by Buchanan and Tullock, *supra* note 68, at 43–46, see also at 96 and 249.

70. This was already advanced by Rousseau, see *Du contrat social* (1762), Livre IV, Chapitre II, at 154: “Deux maximes générales peuvent servir à régler ces rapports: l’une, que plus les délibérations sont importantes et graves, plus l’avis qui l’emporte doit approcher de l’unanimité; l’autre, que plus l’affaire agitée exige de célérité, plus on doit resserrer la différence prescrite dans le partage des avis; ... c’est sur leur combinaison que s’établissent les meilleurs rapports qu’on peut donner à la pluralité pour prononcer.”

71. Cf. Benz, *supra* note 9, at 100 and 83.

72. See, e.g. Vibert, *supra* note 68, at 131, 136–137, 147.

that intergovernmental conference, officially acknowledged as one future option of reform of the Council's decision-making after the Union's enlargement.<sup>73</sup> The concept has only very roughly been taken over by the Treaty of Nice which foresees that from 1 January 2005 on, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62 % of the total population of the Union. If that condition is shown not to have been met, the decision in question shall, according to the Nice Protocol on Enlargement, not be adopted.<sup>74</sup> That right to request a check of the representativeness of the Council decision in terms of numbers of citizens was taken up by the Convention without modification, but limited to the period from 1 January 2005 until 1 November 2009.<sup>75</sup> In that period, the apportionment of votes to the Member States will remain identical to that foreseen in the relevant Nice Protocol.<sup>76</sup> After that date, Article 24(1) and (3) Draft Constitution stipulate that, "[w]hen the European Council or the Council of Ministers takes decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union." This double majority completely replaces the previous system of weighted votes. One state has one vote, and the citizens come in via the "demographic safety net" of three fifths, that is a 60 per cent requirement. This definition of the qualified majority was a major issue of debate in the Convention. One reason for the controversy was that the scheme of double majority in the Council reduces the influence of powerful, but lesser populated Member States, such as France and notably Spain.<sup>77</sup> But this reduction is an important step towards a fair representation of citizens, who are the basic unit of any democratic regime.

The requirement of double majority is laudable for two reasons. First, it is

73. Art. 1 of the Amsterdam Protocol (No. 7) on the institutions with the prospect of enlargement of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, mentions as reform options either new weighting of the votes in the Council or the introduction of a dual majority (O.J. 1997, C 340/111). The mandate for the IGC in Nice in the Presidency Conclusions of Cologne of 3/4 June 1999, para 53, was to cover the "weighting of votes in the Council (re-weighting, introduction of a dual majority and threshold for qualified-majority decision-making)." ([europa.eu.int/council/off/conclu/june99/june99\\_en.htm](http://europa.eu.int/council/off/conclu/june99/june99_en.htm)).

74. Art. 3 of the Protocol on the Enlargement of the European Union, Annex 1 of the Treaty of Nice of 26 Feb. 2001 (O.J. 2001, C 80/49).

75. Art. 2 of the Protocol on the Representation of Citizens in the European Parliament and the Weighting of Votes in the European Council and the Council of Ministers, CONV 850 /03, at 232.

76. *Supra* note 74. The sole modification by the Draft Constitution is that the weighting now also applies to the European Council when (only when) it decides by qualified majority (and not only to the Council of Ministers).

77. Note that Spain with 40 million inhabitants now has 27 votes in the Council, whereas Germany with 82 million inhabitants has only 29 votes.

simple and comprehensible for the public. Second, it reflects the fact that the Council is currently *both* the federal organ in the EU (representing the Member States) *and* – besides the Parliament – an important representative of the citizens. The introduction of the double majority is therefore an important constitutional step forward.

### 2.1.3. *The Commission*

#### 2.1.3.1. *The law as it stands*

The main democratic problem of the Commission is the lack of transparency in its decision-making.<sup>78</sup> This is most relevant where the Commission acts as a real legislator, as it may upon delegation by the Council (Art. 202 EC, third indent). The law-making procedures of the Commission are notorious as “comitology”. These “comitology” procedures<sup>79</sup> are problematic from a democratic point of view. First, the choice of type of committee is inconsistent and therefore hardly predictable for the affected citizen. Second, the EP is not actively involved and barely informed about the committee proceedings. Finally, individual access to Committee documents was not granted before 1999. The Council’s comitology decision of that year,<sup>80</sup> which thoroughly reformed comitology proceedings, sought to improve in particular the aspects just mentioned and constitutes a step in the right direction.

#### 2.1.3.2. *The Draft Constitution’s Provisions*

The 2003 Draft Constitution creates a new category of legislation: delegated

78. There are of further aspects of democracy, such as the composition of the Commission. The Draft Constitution suggests a “College”, limited to the President, the Union Minister of Foreign Affairs/Vice-President, and 13 European Commissioners. Additionally, there would be non-voting Commissioners (Art. I-25(3) Draft Constitution). However, the question of democratic representation appears less pressing as the Commission acts in the general European interest and is completely independent in the performance of its duties (Art. 213(2) EC; Art. I-25(4) Draft Constitution). Consequently, the Commissioners (voting or non-voting) do not represent the Member States. See on the appointment and removal of Commissioners *supra* section 2.1.1. (text at note 53). See on the general problems of majority voting (also practised within the Commission under Art. 219(2) EC) *supra* Section 2.1.2. (text at note 54).

79. Council Decision 1999/468/EC of 28 June 1999 laying down procedures for the exercise of implementing powers conferred on the Commission (Second Council Decision on Comitology), O.J. 1999, L 184/23. See generally Kortenbergh, “Comitologie: le retour”, 34 RTDE (1998), 317–327; Bignami, “The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology”, 4 Berhoeven, “Towards a Legal Framework for Executive Rule-Making in the EU?, The Contribution of the New Comitology Decision”, 37 CML Rev. (2000), 645–686 (“step in the right direction”, but “still too vague”, *ibid.*, at 686). See also case T-188/97, *Rothmans v. Commission*, [1999] ECR, II-2463, paras. 53–64.

80. *Supra* note 79.

regulation (Art. 35).<sup>81</sup> This innovative element is based on proposals of Working Group IX on Simplification.<sup>82</sup> Delegated regulation concerns the Commission's legislative (law-making) functions, and not mere executive functions such as implementation or enforcement of laws. The allowance for delegated regulation does not actually take the place of comitology procedures, but offers a different framework for them, which may in the long run have an effect on their details.

Delegated law-making poses a democratic dilemma. On the one hand, strict non-delegation is undemocratic to the extent that excessive detail in Community legislation reduces transparency. Legal clarity, and thereby, democracy, is improved if Community legislation concentrates on basic issues, leaving technical details to delegated acts. On the other hand, the delegated legislation by the Commission enjoys a lower degree of democratic legitimation, as explained above. It is therefore important that essential features of the subject matter in question are covered by the European law itself. Article 35(1) Draft Constitution is very clear on this: "A delegation may not cover the essential elements of an area. These shall be reserved for the European law or framework law." Such a guarantee of non-delegation is absent in the present Article 202 EC. The new clause therefore constitutes progress in democratic terms.

Democracy also requires that delegation is controlled by the primary law-maker, that is by the EP and the Council of Ministers. The exercise of this control must in turn be supervised by the ECJ, which is competent to determine whether the limits of delegated authority are overstepped. Article 35(2) of the Draft Constitution leaves the specification of the control mechanisms to the delegating law itself, and names only respective "possibilities". Finally, the option of revoking delegation must be guaranteed. Article 35(2) Draft Constitution allows that revocation of the delegation may be decided

81. Art. 35 Draft Constitution: "(1) European laws and European framework laws may delegate to the Commission the power to enact delegated regulations to supplement or to amend certain non-essential elements of the European law or framework law. The objectives, content, scope and duration of the delegation shall be explicitly defined in the European laws and framework laws. A delegation may not cover the essential elements of an area. These shall be reserved for the European law or framework law. (2) The conditions of application to which the delegation is subject shall be explicitly determined in the European laws and framework laws. They may consist of the following possibilities: The European Parliament or the Council may decide to revoke the delegation; the delegated regulation may enter into force only if no objection has been expressed by the European parliament or the Council of Ministers within a period set by the European parliament. For purpose of the preceding paragraph, the European parliament shall act by a majority of its members, and the Council of Ministers by a qualified majority."

82. See CONV 424/02, WG IX 13, Final Report of the Working Group IX on Simplification, 29 Nov. 2002, at 8 et seq.

by the Parliament or the Council separately. This strengthens the position of the EP.<sup>83</sup>

Without denying the democratic problem of comitology, we might put it into perspective by two observations. The first is that, while comitology indeed eclipses parliamentary participation and public debate, it might enjoy a different type of democratic legitimacy stemming from the fact that comitology procedures allow diverse interest groups and experts to introduce their views,<sup>84</sup> even if not really in an even-handed, representative fashion. The second observation is, that “the legitimization of secondary norms is an endemic problem for all domestic political systems.”<sup>85</sup> We should not judge European governance more strictly than domestic law-making. Because a concrete procedural regime on delegated regulation was not established in the Draft Constitution (which would not be the appropriate place), the problems of lack of transparency and lobbying in comitology proceedings were not and could not be solved by the 2003 Draft Constitution. This solution must be found at the level of legislation, that is in the delegating laws themselves and possibly in a new general regime substituting the 1999 comitology decision.

## 2.2. *National Parliaments*

The work of national parliaments in relation to the Union constitutes one element of democratic legitimacy of European governance.<sup>86</sup> This insight was the starting-point of the Laeken Declaration’s concrete questions regarding the national parliaments put to the Convention: “Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European

83. See considerations in CONV 724/03 of 26 May 2003, Draft Constitution, Volume I – Revised text of Part One, at 93 (Praesidium’s Comments).

84. This has been forcefully argued by Joerges and Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology”, 3 *ELJ* (1997), 273, at 285.

85. Craig, “The Nature of the Community: Integration Theory and Democratic Theory”, in Craig and de Búrca (Eds.), *The Evolution of EU Law* (OUP, 1999) p. 1, at 25.

86. Current legal bases are: Protocol annexed to the Treaty on European Union and the Treaties establishing the European Community, the European Coal and Steel and the European Atomic Energy Community – Protocol (No. 9) on the Role of National Parliaments in the European Union, Art. 2 (O.J. 1997, C 340/113); Declaration No. 13 on the Role of National Parliaments in the European Union annexed to the Final Act of Maastricht (O.J. 1992, C 191/100). In the literature, see Katz, “Representation, the Locus of Democratic Legitimation, and the Role of the National Parliaments in the European Union”, in Katz and Wessels (Eds.), *The European Parliament, the National Parliaments, and European Integration* (Oxford, 1999), pp. 21–44; on the constraints on the ability of national parliaments to represent the public at the European level see Lord, *supra* note 4, at 56–59.



Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?”<sup>87</sup>

Throughout the Convention’s debates, widespread recognition of the importance of integration of national parliaments was evident.<sup>88</sup> The results are two protocols which provide for their more active involvement in European affairs: the Protocol on the Role of National Parliaments<sup>89</sup> and the Protocol on the Application of the Principles of Subsidiarity and Proportionality.<sup>90</sup>

The first Protocol deals with information for Member States’ national parliaments and with interparliamentary cooperation. Commission documents, in particular legislative proposals and the annual legislative programme should be forwarded directly to the national parliaments (Arts. 1 and 2 of the Protocol on the Role of National Parliaments). A six-week period must elapse between a legislative proposal (as made known to the national parliaments) and its adoption, subject to exceptions on grounds of urgency (Art. 4). This scheme is an important improvement on the current regime set up by the Amsterdam Protocol (No. 9) on the Role of National Parliaments in the EU, under which Commission proposals for legislation must only “be made available in good time” to the governments, which may forward them to the parliaments.<sup>91</sup> Title II of the protocol, “Interparliamentary cooperation”, cuts back the monitoring functions of the “Conference of European Affairs Committees” (COSAC), but introduces the Conference’s task to “promote the exchange of information and best practice between Member States’ Parliaments and the European Parliament, including their special committees.” COSAC is thereby transformed into an interparliamentary platform.

The Protocol on the Application of the Principles of Subsidiarity and Proportionality embodies one of the most innovative features of the Draft Constitution, namely the “early warning system” with regard to observance of the principle of subsidiarity. This system was suggested by Working Group I on the Principle of Subsidiarity.<sup>92</sup> Each national parliament or parliamentary chamber may, within six weeks of a legislative proposal being issued by the Commission, send the European institutions a reasoned opinion setting out its concerns regarding an infringement of the principle of subsidiarity (Art. 5). Above a threshold number of one third of the national parliaments, the

87. Laeken Declaration of 15 Dec. 2001, *supra* note 18, Part II, under subtitle 3.

88. See, e.g., CONV 378/02 of 31 Oct. 2002, Summary report of the plenary session of 28/29 Oct. 2002, at 4.

89. CONV 850/03, at 226.

90. CONV 850/03, at 229.

91. Protocol No. 9, *supra* note 86, Art. 2.

92. See CONV 286/02 (WG I 15) of 23 Sept. 2002, Conclusions of Working Group I on the Principle of Subsidiarity, at 5–7.

Commission is obliged to reconsider its proposal (Art. 6).<sup>93</sup> The early warning system constitutes a new *ex ante* political monitoring mechanism triggered by national parliaments which are thereby directly involved in the European legislative process. The same monitoring procedure is foreseen for European legislation under the flexibility clause (Art. I-17 Draft Constitution). This should empower national parliaments to keep under surveillance possible tendencies to undermine the principle of enumerated powers.

On the whole, the Draft Constitution strengthens the legitimacy potential of the national parliaments with regard to European democracy. Nevertheless, national parliaments' direct involvement faces inherent limitations arising from the inevitable complexity of the legislative process. It remains to be seen whether national parliaments will have the capacity to deal with more than a fraction of European legislation. Moreover, tighter integration of the national parliaments risks in turn aggravating the lack of transparency of the process as a whole. All in all, national parliaments can most likely function as European co-legislators and co-supervisors in only a quite limited way. Their duty remains first and foremost to hold their governments to account when they take decisions at a European level<sup>94</sup> – a duty which they have in the past not always been willing to fulfil.

93. The relevant provisions of the Protocol on the Role of National Parliaments are as follows:

Art. 3: "The Commission shall send all its legislative proposals and its amended proposals to the national Parliaments of the Member States at the same time as to the Union legislator. Upon adoption, legislative resolutions of the European Parliament and positions of the Council of Ministers shall be sent to the national Parliaments of the Member States."

Art. 5: "Any national Parliament or any chamber of a national Parliament of a Member State may, within six weeks from the date of transmission of the Commission's legislative proposal, send to the President of the European Parliament, the Council of Ministers and the Commission a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity"

Art. 6: "The European Parliament, the Council of Ministers and the Commission shall take account of the reasoned opinion issued by Member States' national Parliaments or by a chamber of a national Parliament. The national Parliaments of Member States with unicameral Parliamentary systems shall have two votes, while each of the chambers of a bicameral Parliamentary system shall have one vote. Where reasoned opinion on a Commission proposal's non-compliance with the principle of subsidiarity represents at least one third of all the votes allocated to the Member States' national Parliaments and their chambers, the Commission shall review its proposal. The threshold shall be at least a quarter in the case of a Commission proposal or an initiative emanating from a group of Member States under the provision of Article III-165 of the Constitution in the area of freedom, security and justice."

94. See in that sense the chair of Working Group IV in CONV 378/02, *supra* note 88, at 3.

### 2.3. Transparency and publicity

Although Article 1 TEU speaks of a Union “in which decisions are taken as openly as possible”, one of the main democratic shortcomings of the European system of government is its lack of transparency and publicity.<sup>95</sup> Transparency and publicity of both political deliberation and law-making are indispensable conditions for a functioning democracy. Without publicity, citizens cannot give an informed consent to government action, they cannot discuss or criticize it in a well-founded manner, cannot intervene promptly in the political process and cannot attribute responsibility. In short, lack of transparency impedes democratic control and oversight.<sup>96</sup> Moreover, it favours lobbying by well-organized pressure groups to the detriment of diffuse interests.

#### 2.3.1. The law as it stands

The issue of transparency has various aspects. One is the lack of transparency created by the sheer *complexity of European laws*, once they are enacted. This is, however, a problem for the rule of law rather than for democracy. Another aspect is the question of *individual access to European documents*. This concerns the administrative rather than the legislative level. The individual right to access has been much improved by the Treaty of Amsterdam<sup>97</sup> with secondary law based thereon<sup>98</sup> and by the Court’s case law.<sup>99</sup> Moreover, Article 42 of the Charter of Fundamental Rights enshrines the right of access to documents as a fundamental right.

95. See Commission, *European Governance: A White Paper* (COM(2001)428). The White Paper was issued on 25 July 2001 and summarizes reflections on the reform of European governance since 2000. The key-word is *openness*. See for a scholarly assessment the contributions in Joerges, Mény and Weiler (Eds.), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance* (Jean Monnet Working Paper Series No. 6/01) (Cambridge (Mass.), 2001).

96. Lodge, “Transparency and Democratic Legitimacy”, 32 *JCMS* (1994), 343–368.

97. Art. 255 EC; special provision with regard to Council documents (Art. 207(3) EC).

98. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (O.J. 2001, L 145/43); Joint Declaration relating to that Regulation (O.J. 2001, L 173/5); Council Decision 2002/682/EC, Euratom of 22 July 2002 adopting the Council’s Rules of Procedure, Annex II: Specific Provisions Regarding Public Access to Council Documents (O.J. 2002, L 230/7); Council Regulation (EC) No. 58/2003 of 19 Dec. 2002 laying down the statute for executive agencies to be entrusted with certain tasks in management of Community programmes, O.J. 2003, L 11/1, Art. 23 (“Access to documents and confidentiality”).

99. Case T-194/94, *Carvel and Guardian Newspapers v. Council* [1995] ECR, II-2765; case T-105/95, *World Wild Life Fund for Nature v. Commission* [1997] ECR, II-313; case T-174/95, *Svenska Journalistförbundet v. Council* [1998] ECR, II-2289. See generally Broberg, “Access to documents: A general principle of Community law?” 6 *EL Rev.* (2002), 194–205.

But what matters most with a view to the functioning of the democratic process is the general “active” duty to *legislate in public* and to publish legislative materials.<sup>100</sup> In the Union, the publicity of law-making was basically only realized in 2002. While the EP has always deliberated in public, this was not true for the Council. As for the Commission, comitology procedures are still not public. The Treaty of Amsterdam obliged the Council, acting as legislator, to publish the results of its votes, but not its deliberations (Art. 207(3) 3rd indent EC). It was only the European Council of Seville of June 2002, drawing conclusions from the Laeken declaration’s quest for transparency, which decided on an “open Council” policy.<sup>101</sup> Implementing the conclusions of Seville, the new rules of procedure for the Council foresee that Council deliberations on acts to be adopted in accordance with the codecision procedure shall be open to the public.<sup>102</sup> In other cases where the Council acts in its legislative capacity, the results of votes and explanations of votes by Council members, as well as pertinent statements in Council minutes must be made public.<sup>103</sup> The conclusion is that the Union has made continuous progress towards enhanced transparency, but that deficiencies remain.

### 2.3.2. *The Draft Constitution’s Provisions*

Increase of transparency and openness was, in tandem with the general problem of European democracy, a crucial issue in the Laeken Declaration<sup>104</sup> and consequently a core task of the Convention. The Draft Constitution acknowledges the centrality of the issue by introducing a novel transparency provision, Article 49 (“Transparency of the proceedings of Union institutions”),<sup>105</sup>

100. Curtin, “‘Civil Society’ and the European Union: Opening spaces for deliberative democracy?”, VII-1 *Collected Courses of the Academy of European Law* (1996) 185, at 259.

101. Presidency Conclusions, Seville European Council, 21/22 June 2002, Annex II. “Measures Concerning the Structure and Functioning of the Council”, Heading E: “Opening Council meetings to the public when the Council is acting in accordance with the procedure for codecision with the European Parliament”. SN 200/1/02 REV 1. [europa.eu.int/futurum/documents/other/oth210602\\_en.pdf](http://europa.eu.int/futurum/documents/other/oth210602_en.pdf) (visited on 5 Sept. 2003).

102. Council’s Rules of Procedure, *supra* note 98, Art. 4–8.

103. Council’s Rules of Procedure, *supra* note 98, Art. 9.

104. Laeken Declaration of 15 Dec. 2001, *supra* note 18, *passim*.

105. Art. 49 Draft Constitution: “(1) In order to promote good governance and ensure the participation of the civil society, the Union Institutions, bodies and agencies shall conduct their work as openly as possible. (2) The EP shall meet in public, as shall the Council of Ministers when examining and adopting a legislative proposal. (3) Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have a right of access to documents of the Union Institutions, bodies and agencies in whatever form they are produced, in accordance with the conditions laid down in Part III. (4) A European law shall lay down the general principles and limits which, on grounds of public or private interest, govern the right of access to such documents. (5) Each Institution, body or agency referred to in

which is specified in the Draft Constitution's institutional part in Article III-305.<sup>106</sup> Article 49(1) Draft Constitution clearly and correctly spells out the *telos* of the concept of openness, which it took over from Article 1 of the current TEU:<sup>107</sup> the function of openness is "*to promote good governance*" and to "*ensure the participation of civil society*." To this end, the Union institutions "shall conduct their work as openly as possible". Given the intrinsic link between transparency and democracy, it is sound to position the principle of transparency in the new Title VI "The Democratic Life of the Union." It also makes sense that the new evocations of "participatory" and "representative democracy" in the new Title VI likewise refer to "transparency" and "openness".<sup>108</sup>

As noted, one facet of the European transparency problem is the general complexity of European law. Consequently, a *simplification of the Union's instruments and procedures* was a key component of the Laeken Declaration.<sup>109</sup> Simplification improves the comprehensibility of the system and is therefore one building-block for achieving "openness". Thus, it has a direct bearing on the level of European democracy.<sup>110</sup> The Draft Constitution manages to simplify Union acts to a significant extent. This begins with a radical cut in the number of instruments, reducing them from the current 16 to five types of legal acts. In particular, the Draft Constitution abolishes the cooperation procedure, which at present still exists in four cases in the area of the Economic and Monetary Union. Also, the Draft Constitution establishes a hierarchy of legislation, in order to relieve the laws from technical details, which currently present a barrier to public understanding.

The second facet of transparency is, as said above, *individual access to documents*. The Draft Constitution incorporates the Charter's fundamental right of access to documents (Art. II-42). This provision is almost literally repeated in Article 49(3) Draft Constitution. The new clauses do not expand

paragraph 3 shall determine in its own rules of procedure specific provisions regarding access to its documents, in accordance with the European law referred to in paragraph 4."

106. Art. III-305: "(1) The Institutions, bodies and agencies of the Union shall recognize the importance of transparency in their work and shall, in application of Article I-49, lay down in their rules of procedure the specific provisions for public access to documents. The Court of Justice and the European Central Bank shall be subject to the provisions of Article I-49 para 3 when exercising their administrative tasks. (2) The European Parliament and the Council of Ministers shall ensure publication of the documents relating to the legislative procedures."

107. CONV 650/03, Praesidium, Comments on the draft articles on the democratic life of the Union, at 10.

108. See, e.g., Art. 45(2); Art. 46(2) and (3) Draft Constitution.

109. Laeken Declaration of 15 Dec. 2001, *supra* note 18, Title II, subheading: "Simplification of the Union's instruments".

110. This is the gist of the introductory statement of the Final Report of the Working Group IX on Simplification of 29 Nov. 2002, at 1 (CONV 424/02, WG IX 13, at 1).

the right of access as granted by Article 255 EC and the implementing provisions. The only difference is that access to documents of agencies and bodies created by the legislator is now guaranteed at the constitutional level, not only by secondary law.<sup>111</sup> According to the Convention's proposals, the regime of access will be regulated at three levels: First, at the constitutional level, which makes openness the rule; second, by a European law laying down the general principles and limits which govern the right of access (see Art. 49(4) Draft Constitution), and finally, by the institutions themselves which will lay down in their rules of procedure the specific provision for public access to documents, of course in accordance with the relevant European law (Art. 49(5) and Art. III-305(1) Draft Constitution).

With regard to democratic governance, the most important aspect of transparency is *public legislation*. Public law-making has, as we have seen, only recently been partly realized in the sphere of the arguably most powerful co-legislator, the Council. However, it is only granted at the low level of procedural rules. This guarantee is constitutionalized by the Draft Constitution, and extended to all types of legislation. Article 49(2) holds: "The EP shall meet in public, as shall the Council of Ministers when examining and adopting a legislative proposal." Under Article III-305(2) "[t]he European Parliament and the Council of Ministers shall ensure publication of the documents relating to the legislative procedures." According to the Praesidium's comments, the reference to the Council's discussion (in the final version of Art. 49: "examining") is intended to cover the entirety of the phase when legislation is under discussion.<sup>112</sup> Consequently, it is the entire phase which is subject to publication.

On the whole, the Draft Constitution constitutes a step towards more transparency and openness (although the relevant provisions in the Draft Constitution are themselves somewhat lacking in transparency due to dispersion and repetition). The regime of individual access to European administrative files is more generous than in many of the Member States' administrative law traditions and present rules. Most important is overall transparency in the work of the Council, which is essential to allow citizens' direct oversight and to facilitate and improve the active involvement of national parliaments in the EU.<sup>113</sup>

Perhaps, the Convention's reforms constitute the maximum of achievement. Even excellent transparency regimes face inherent barriers to transpar-

111. CONV 650/03, Praesidium, Comments on the draft articles on the democratic life of the Union, at 10.

112. CONV 650/03, Comment by Praesidium, at 10.

113. See CONV 353/02 of 22 Oct. 2002: Final Report of the Working Group IV on the role of national parliaments, at 3.

ency. The first is that a certain degree of complexity, which inevitably causes a certain degree of opaqueness, simply results from the fact that Europe is a multi-layered and multi-sectoral political system. Many divergent interests must be accommodated, and therefore a large number of institutions and groups necessarily participate in the process. Another important factor is the bargaining-modus of law-making. Bargaining (with package-deals, trade-offs and so on) requires closed doors. If bargaining took place in public, this would force the negotiators to entrench their positions and would render concessions or re-definition of the problem much more difficult. If we open the bargaining-arena to observations of the general public, actual decision-making will evaporate into the corridors and lunchrooms.<sup>114</sup> This means that genuine publicity of the law-making procedure can be achieved only by replacing the consensual, “horizontal”, bargaining-modus with “hierarchical”, majority-based law-making, but this in turn has its draw-backs, as already discussed in the context of majority voting in the Council.<sup>115</sup>

#### 2.4. *Interim observations at the institutional/functional level*

##### 2.4.1. *Diagnosis: Three functional deficiencies*

The brief analysis of the governing institutions in Europe has revealed that their creation, structure and procedures are less democratic than the purely domestic systems of government in the Member States. A serious problem is the lack of *transparency in law-making processes*, which means that a *conditio sine qua non* for democracy is absent. The 2003 Draft Constitution promises substantial improvements in this respect.

Viewed in terms of *functions*, it might be said that the democratic problem of Europe is, at least, three-fold:

(i) as regards the function of *law-making*, there has been a near-total transfer of activity from the legislative branch to the executive branch: at the national level, the parliaments have less and less subject matter on which to legislate. At the European level, substantive legislation occurs only partially through parliamentary procedures. The national parliaments’ loss of law-making powers is in part compensated by parliamentary participation in European law-making. Options for involvement have been improved by the Draft Constitution. Moreover, the Draft Constitution has strengthened the EP as a co-legislator through extension of the coverage of codecision (ordinary legislative procedure) and by related procedural improvements;

114. This is exactly what happened at the WTO conference of ministers in Seattle in December 1999, where developing countries were granted full access.

115. *Supra* section 2.1.2.

(ii) the second parliamentary function of *controlling* government is also impaired. The representatives of the Member States' governments acting in the Council are not controlled by national parliaments. The principal, but not sole, reason for this lack of control has been the secret deliberation and voting in the Council. At least this serious barrier is completely removed by the 2003 Draft Constitution. The Member States' governments are not controlled by the European Parliament, because the European Parliament can not legally – i.e. according to the scheme of the EC Treaty – hold the Council responsible. The Draft Constitution does not alter this. On the other hand, parliamentary control of the Commission is granted. The Draft Constitution does not provide for substantial modifications in this context. On the whole, however, the Commission's control is insufficient, because the Commission forms only one part of the "European government". Looking at the creation and composition of the EP on the one hand, and its respective powers on the other hand, a crucial point seems to be that there are *no genuinely European elections on European issues, fought at a European level, to install and remove European governments solely on the basis of political disagreement*.<sup>116</sup> This means that effective popular control of European government (consisting of the Commission and the Council) via parliamentary elections or referendums does not exist. This vacuum might in part be filled by the European citizens' initiative, which is therefore an important constitutional development;

(iii) finally, there are democratic deficiencies at the higher-law level of European constitution-making, in the processes of amending and transforming the European treaties themselves. European citizens hardly qualify as a "*pouvoir constituant*" in this regard.<sup>117</sup> The Convention method itself, which was applied for the first time in 2003 without any formal legal basis, alleviates this deficiency at the level of Constitution-making. The Convention method is more democratic, because citizens' direct representatives (members of the national parliaments, members of the EP plus (without vote) MPs of the accession candidates) held the majority of seats in the Convention, because the constitutional debate was open to the public, and because this debate included a broad public hearing. The 2003 Draft Constitution itself foresees the Convention method as a compulsory step in the procedure for revising the Treaty establishing the Constitution (Art. IV-7(2) Draft Constitution). However, neither the current Convention nor eventual future Conventions can formulate binding constitutional texts. They may only address

116. Katz, *supra* note 32, at 56.

117. See on this problem Peters, "Verfassungsgesetzgebung: Demokratische Legitimation und direkte Demokratie – aus der Sicht der EU", in Michel and Epiney (Eds.), *Une constitution pour l'Europe* (Fribourg, 2003), pp. 93–114.



recommendations to the governments with more or less *de facto* authority.<sup>118</sup> Remaining shortcomings of European popular sovereignty with regard to Constitution-making will not be further examined in this article.

My overall conclusion with regard to the existing *functional democratic deficiencies* is that the 2003 Draft Constitution has definitely *mitigated* them, in part dramatically. Moreover, if you compare the European system (current and as suggested by the Draft Constitution) to the Member States' democracies as they work in practice, the "deficit" is somewhat slighter than it appears at first glance, but it undeniably still exists – even after the Convention.

#### 2.4.2. Possible responses

There are at least five possible solutions to the problem identified.

– The ostensibly "realistic" option considers the democratic deficit to be inherent in the overall European project, which was not, originally, even supposed to be democratic at all.<sup>119</sup> But this option of simply renouncing on democratic legitimacy is foreclosed by the fact that democracy has, meanwhile, been acknowledged as a structural principle of the Union (see Art. 6(1) TEU; Part I, Title VI Draft Constitution).<sup>120</sup> Last but not least, democratic legitimacy is required by Member States' constitutions as a condition for the transfer of sovereign powers.<sup>121</sup>

– The "resigned" option attempts to freeze integration at the current point in order not to aggravate the democratic deficit further. This option is not viable either, in view of the continuing mobility of production factors and the continuing globalization of many kinds of problems, which can not be solved within the framework of the nation State.

118. See the Laeken declaration, *supra* note 18, Title III, subheading "final document"; and Art. IV-7(2) 2nd indent 2 Draft Constitution.

119. On the inherently anti-democratic *méthode Monnet*, see Featherstone, "Jean Monnet and the 'Democratic Deficit' in the European Union", 32 JCMS (1994), 149–170; Burgess, *Federalism and the European Union: Political Ideas, Influences and Strategies in the European Community, 1972–1987* (London, 1989), at pp. 44–55; Chryssochoou, *Democracy in the European Union* (London, 1998), at 156. See also Laughland, *The Tainted Source: The Undemocratic Origins of the European Idea* (London, 1997).

120. Although the Treaties of Rome do not mention the term democracy, the principle of democracy has been applied to the EEC at least since the introduction of direct elections to the EP in 1979. See also recital 3 of the preamble of the Single European Act of 28 Feb. 1986 ([europa.eu.int/abc/obj/treaties/en/entr14a.htm](http://europa.eu.int/abc/obj/treaties/en/entr14a.htm)); recital 5 of the preamble of the Treaty of European Union of Maastricht of 7 Feb. 1992 and finally recital 6 of the preamble TEU (Amsterdam) of 2 Oct. 1997. According to the case law, the participation of the EP in legislation as provided for in the treaties reflects the community principle of democracy: see Case 138/79, *Roquette Frères v. Council*, [1980] ECR 3333, para 33; Case 139/79, *Maizena v. Council*, [1980] ECR 3393, para 34; Case C-300/89, *Commission v. Council (Titandioxide)*, [1991] ECR, I-2867, para 20.

121. See, e.g., Art. 23(1), sentence 1 of the German Basic Law.

- The third option is the genuinely “European” one, of strengthening the power of the European Parliament in order to make the Union itself more democratic. This strategy has been applied slowly but surely through the reforms of the European treaties. As we have seen (*supra* Section 2.1.1.), the Convention clearly followed that path.
- But the genuinely “European strategy” is criticized by a fourth position, which I will call the “fundamentalist” one: its proponents argue that European governance is inherently limited in its democratic capacity. The problem is – so the argument runs – not only one of parliamentary deficiency, but a deeper one whose roots largely lie in insurmountable extra-legal deficiencies.<sup>122</sup>
- The fifth position, which is supported by this paper, argues that the European Union needs more democracy, and that it is in principle capable of becoming more democratic – but not necessarily via the parliament.

### 3. General problems of European democracy

#### 3.1. *The Subject of Democratic Legitimacy: The European Political Constituency*<sup>123</sup>

First, the “fundamentalist” assumptions are questioned.

##### 3.1.1. *No European “Staatsvolk” is needed*

The first “fundamentalist” concern relates to the subject or source of a European democratic structure. This aspect is something of a *malaise allemande*, as several German lawyers and theorists are concerned about the absence of a European “people”, which would be the necessary carrier of a European democracy.<sup>124</sup> This position considers democracy and the nation State as cor-

122. Kielmannsegg, *supra* note 65, at 58; in this sense also Grimm, “Mit einer Aufwertung des Europa-Parlaments ist es nicht getan – Das Demokratiedefizit der EG hat strukturelle Ursachen”, 6 *Jahrbuch Staats- u. Verwaltungswissenschaft* (1992/93), 13, at 13–14; Ossenbühl, “Maastricht und das Grundgesetz – eine verfassungsrechtliche Wende?”, 108 DVBL (1993), 629, at 634; Schmitt Glaeser, *Grundgesetz und Europarecht als Elemente Europäischen Verfassungsrechts* (Berlin, 1996), p. 216; Scharpf, *supra* note 16, at 233.

123. This part builds on ideas from Peters, *supra* note 11, at 651–662.

124. See extensively Augustin, *Das Volk in der Europäischen Union: Zu Inhalt und Kritik eines normativen Begriffs* (Berlin, 2000); Kirchhof, “Der deutsche Staat im Prozeß der europäischen Integration”, in Isensee and Kirchhof (Eds.), VII *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (Heidelberg, 1992) 855, para 33: “Democracy presupposes integration in a state *Volk*” (translation by the author). According to Udo Di Fabio, the concept of the State and of democracy form an inseparable unit. Renouncing State sovereignty means

ollaries, and has its intellectual roots in the political philosophy of *Hegel*, according to which the individual can be free only in and by means of the State.<sup>125</sup> The response is that although nation states have historically been the ordinary locus of democracy, there is no logical or necessary link. It is widely acknowledged, – and has been at least since the 1970s – that democracy is a principle of organization that is not reserved for states, but can be applied to all kinds of societal structures. It is not therefore necessary to have a *Staatsvolk* for a European State.

### 3.1.2. *A European demos in statu nascendi exists*

The weaker version of the *Hegelian* position just mentioned is located in the quest for a “collective” that would be at least *similar* to the people of a nation State.<sup>126</sup> However, there is no European consensus on what the decisive characteristics of such a collective body would be. On the contrary, we know that there are divergent philosophies about what makes “a people” throughout Europe. The most prominent conceptions of “people” or “nation” are the German and the French ones. In a very simplified and abbreviated way, we can say that the French tradition of *la nation* is based on a common political will to respect basic political ideals (*liberté, égalité, fraternité*). As Ernest Renan put it: “*Une nation est une âme, un principe spirituel*”.<sup>127</sup> The competing German view of a “people” or “nation” focuses more on ethnic origin and on common culture. Because it rests on elements which are “given” rather than elements which can grow and which can be acquired, it is a more deterministic and “closed” conception than the (ideal) French one. The point to be made in terms of Europe is that if we rely on a “French” conception of

renouncing popular sovereignty (Di Fabio, “Der neue Art. 23 des Grundgesetzes”, 32 *Der Staat* (1993) 191, at 200–201, 206, 203). According to Randelzhofer, the “democratic deficiency of the EC cannot be overcome by empowerment of the EP, because the EP does not represent a State’s people and certainly not the German People” (Randelzhofer, “Zum behaupteten Demokratiedefizit in der Europäischen Gemeinschaft”, in Hommelhoff and Kirchhof (Eds.), *Der Staatenverbund der Europäischen Union* (Heidelberg, 1994) 39, at 54; translation by the author).

125. Hegel, *Grundlinien der Philosophie des Rechts*, in Hegel, *Sämtliche Werke Vol. 7*, ed. by H. Glockner (Stuttgart, 1928, orig. 1821), § 258 (at 329); see also Müller, “Von der Idee des Staates”, in Müller, *Ausgewählte Abhandlungen* (Jena, 1921, orig. 1809) p. 3, at 5: “Man is unthinkable outside the State” (translation by the author).

126. Kirchhof, *supra* note 124, para 53; Ossenbühl, *supra* note 122, at 634; Grimm, *supra* note 122, at 16; Di Fabio, *supra* note 124, at 202–203; Isensee, “Nachwort: Europa – die politische Erfindung eines Erdteils”, in Isensee (Ed.), *Europa als politische Idee und als rechtliche Form* (Berlin, 1994) 103, at 133; Kirchhof, “Die Gewaltenbalance zwischen den staatlichen und europäischen Organen”, 53 *JZ* (1998), 965, at 972; Chryssochoou, *supra* note 119, at vii and 16.

127. Renan, “Qu’est-ce qu’une nation?”, in Renan, *I Oeuvres complètes* (Paris, 1947, orig. 1882) p. 887, at 903.

the “people”, we can already discern a European “demos”, at least in *statu nascendi*. This theme has been elaborated by Rainer Lepsius, Jürgen Habermas and Joseph Weiler,<sup>128</sup> partly in reaction to the notorious Maastricht decision of the German Federal Constitutional Court.<sup>129</sup>

### 3.1.3. *The carrier of democracy can evolve within democratic structures*

By saying, “*in statu nascendi*”, the intention is to stress that the carrier of democracy can evolve *within democratic structures*. The people or the sovereign, from whom democratic government ostensibly emanates, is not a pre-political, natural entity. It is not the origin of a polity, but often a product of deliberate nation-building.<sup>130</sup> So it would be a-historical and unrealistic to ask for an already existing European “people” as a pre-condition of a European democracy. It therefore makes sense that in his official presentation of the final draft, the Convention’s President opined that cooperation between the national parliaments and the EP should be organized on a regular basis, so that a “European political constituency” might emerge, which would be the first step towards a genuinely European demos.”<sup>131</sup>

### 3.2. *Extra-legal conditions of a functioning democracy*

Moving away from the “carrier” of democracy, the extra-legal conditions of a functioning democracy will now be discussed.<sup>132</sup>

128. Lepsius, “‘Ethnos’ und ‘Demos’”, 38 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* (1986), 751, at 756–757; Habermas, “Remarks on Dieter Grimm’s ‘Does Europe Need a Constitution?’”, 1 *ELJ* (1995), 303 at 305–306; Weiler, “The Reformation of European Constitutionalism”, 35 *JCMS* (1997), 97, at 118–122. See also van Gerven, “Toward a Coherent Constitutional System within the European Union”, 2 *EPL* (1996), 81, at 84; Mancini, “Europe: The Case for Statehood”, 4 *ELJ* (1998), 29, at 35.

129. The German Federal Constitutional Court (BVerfGE 89, 155, 184 (1993) – *Maastricht*) searched for a “permanent legal link”, which is as tight as a people’s affiliation to a State and which manifests an “existential commonality” (translation by the author).

130. See the assessment of the formation of a unified French nation as a “political wonder” already at the time of the French revolution in consequence of “the love of freedom” (*Révolutions de Paris, dédiées à la Nation et au District des Petits-Augustins*, ed. by Prudhomme, Paris, No. 20, 21–28 Nov. 1789, 2–3). In the literature, see Gellner, *Nations and Nationalism* (Berlin, 1983), at 55 with the assertion that “it is nationalism which engenders nations, and not the other way round.” See also Hobsbawm, *Nations and Nationalism since 1780* (Frankfurt a.M., 1990), pp. 80–100 (Chap. 3) on “nationalism from above”. From a different angle, Schumpeter, *Capitalism, Socialism and Democracy* (London, 1976, 1st ed. 1942), Chap. 21 and 22, esp. at 263: “[T]he will of the people is the product and not the motive power of the political process.”

131. Rapport orale, *supra* note 30, p. 13.

132. See in detail Peters, *supra* note 11, at 669–720.

### 3.2.1. *The democratic infrastructure*

A functioning democracy needs a so-called democratic or participatory infrastructure, which goes beyond the organization of periodic elections. It needs a common public sphere, in which political discourse over the common good can take place through political parties, interest groups, NGOs, media and other forums. However, the European democratic infrastructure (the “European public”, a “European public opinion”, European political parties (cf. Art. 191 EC; Art. 45(4) and Art. III-233 Draft Constitution) is quite weak, because the respective institutions are still more or less nationally fragmented.<sup>133</sup> For instance, the European Convention and the question of a European Constitution were simply not an issue in the elections to the Member States’ national parliaments which occurred in the crucial phase of the work of the Convention.

### 3.2.2. *Homogeneity and basic consensus*

A different issue has been discussed – again mostly in Germany – in terms of the polity “lacking homogeneity”<sup>134</sup> (cultural, linguistic, political, social and so forth) and “lacking basic consensus”. This discourse of “homogeneity” is objectionable for various reasons. One of the most important objections is that the quest for homogeneity bears the danger of homogenization through unacceptable means, such as assimilation or exclusion. The infamous dictum of *Carl Schmitt* in this regard is well known: According to Schmitt, democracy “necessarily needs, firstly, homogeneity, and secondly – eventually – the exclusion or destruction of heterogeneous elements.... The political power of a democracy manifests itself in the fact that it can extinguish or keep away the alien and unequal, which threatens homogeneity.”<sup>135</sup> The quest for homogeneity emphasizes difference and distance from the “other” and ultimately boils down to *Schmitt’s* distinction of friend and foe.<sup>136</sup>

133. Cf. Siedentop, *Democracy in Europe* (London, 2001), Chap. 7 (pp. 122–150) on “Creating an Open Political Class”.

134. Offe, “‘Homogeneity’ and constitutional democracy: Coping with identity conflicts through group rights”, 6 *The Journal of Political Philosophy* (1999), 113, at 119: A stable democracy is homogeneous “because all (or at any rate the vast majority) of the people share a commitment to the state and its democratic regime form, they are tied to their fellow citizens through and understanding of the commonality of their fate and the recognition of equal liberties, and they rank these commitments and loyalties higher than the various cleavages that divide national society”. See also Katz, *supra* note 32, at 61: The higher the perceived level of community, the lower the danger of majorities trampling on the rights or interests of others. The lower the level of community, the more profoundly are interests likely to clash.

135. Schmitt, “Der Gegensatz von Parlamentarismus und moderner Massendemokratie”, in Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939* (Berlin, 1988, orig. 1926) 52, at 59 (translation by the author).

136. Schmitt, *Der Begriff des Politischen* (Berlin, 1932), at p. 14.

The idea of homogeneity overlaps with the quest for a societal “basic consensus”. The basic consensus is – so to speak – the homogeneity of opinions on the foundational principles of society. It is considered as the pre-requisite of a viable democracy,<sup>137</sup> because the basic consensus guarantees the stability of institutions, serves as a guide-line for deciding controversial issues, and discharges politics on those issues where no vote is needed. The basic consensus also triggers the famous “diffuse support”<sup>138</sup> of the system by its citizens.

The critical stance now is that because of the diversity of living conditions, mentalities and traditions in the Member States, a basic consensus has yet to emerge.<sup>139</sup> However, in a secular and pluralistic society, a substantive basic consensus can not mean agreement on absolute and ultimate values. The basic consensus can at best be general and provisional.<sup>140</sup> It is necessarily vague and only partially articulated. Often it is only a negative consensus, meaning that there is agreement about what is not acceptable. The basic consensus is not necessarily rationally justified, but is a question of habit and emotion. In this very general and relative sense, a European basic consensus does exist. Public opinion polls show that the idea of democracy and of core fundamental rights is approved by citizens throughout all the Member States equally.<sup>141</sup>

### 3.2.3. *The multiplicity of European languages*

Another type of problematic “homogeneity” is the homogeneity of language. The multiplicity of European languages affects European democracy in two ways.

137. See in detail Eisel, *Minimalkonsens und freiheitliche Demokratie* (Paderborn, 1986) with further references. Siedentop, *supra* note 133, at 25: “Our object should be to create a culture of consent in Europe.”

138. Easton, *A Systems Analysis of Political Life* (New York, 1965), at pp. 273–274.

139. See e.g. von Bogdandy, “Zweierlei Verfassungsrecht: Europäisierung als Gefährdung des gesellschaftlichen Grundkonsenses?”, 39 *Der Staat* (2000), 163, at 171–182.

140. Albert, “Aufklärung und Steuerung: Gesellschaft, Wissenschaft und Politik in der Perspektive des kritischen Rationalismus”, 17 *Hamburger Jahrbuch für Wirtschafts- und Gesellschaftspolitik* (1972), 11, at 25–26. It seems plausible to ask for respect for human dignity and human rights, for democratic rules of the game and for an individual renouncement of the resort to violence (Eisel, *supra* note 137, at 91–92).

141. Immerfall and Sobisch, “Europäische Integration und europäische Identität: Die Europäische Union im Bewusstsein ihrer Bürger”, 47 *Aus Politik und Zeitgeschichte* (1997), B10, 25, at 34 with further references. This basic consensus also seems to carry the diffuse support of the EC/EU. According to opinion polls from spring 1999, only 74% of the interviewed who support the membership of their respective countries in the EU believe that their country can profit from this membership (51 *Eurobarometer* (July 1999) 27). That is to say that many Europeans are ready to live with the EU even though they perceive it as a disadvantage for their country. This can be seen as proof of the existence of a diffuse support.

### 3.2.3.1. *Barrier to a democratic discourse?*

First, the formation of European public opinion and of democratic institutions is certainly more difficult in the absence of a common language. That is why *John Stuart Mill* already asserted, in his “Considerations on Representative Government”, that “[f]ree institutions are next to impossible in a country made up of different nationalities.”<sup>142</sup> True, a functioning democracy depends on informing the public, on communication between citizens and the governing institutions, and on public debate and participation. All this presupposes that communication is possible.

However, a uniform language is no *conditio sine qua non* for this. What matters is a uniform space of communication, not of language. The space of communication and the space of a common language are not necessarily identical. Even within a single language-community, there need not be a common discourse. Those German and Austrian citizens who read the *Bild-* or *Kronenzeitung* do not participate in the same public discourse as those who read the *Frankfurter Allgemeine Zeitung* or the *Neue Zürcher Zeitung*. The fact that both groups speak German does not link their discourse. Conversely, a single space of communication can encompass various languages, as multilingual democracies demonstrate. More important than a common language seems to be a common media-scene in which European issues are reported and discussed without focussing exclusively on the extent to which a certain policy favours or prejudices one’s own country.

### 3.2.3.2. *Barrier to a European identity?*

The absence of a European language touches a second aspect, which is also important for a European democracy. It is the question of a European collective identity.<sup>143</sup> Some commentators consider linguistic diversity to be an especially important barrier to the evolution of a common identity. This assertion is, however, based on an outdated theory, which exaggerates the role of language amongst the multiple factors of identity-formation.<sup>144</sup> Despite the absence of a common language, a common European cultural heri-

142. “Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist ... The same books, newspapers, pamphlets, speeches, do not reach [the different sections of the country] ... The same incidents, the same acts, the same system of government, affect them in different ways ...” J.S. Mill, *Considerations on Representative Government*, ed. by C. Shields (Indianapolis, 1958, orig. 1861), Chap. 16 (pp. 230–231).

143. See Lord, *supra* note 4, 107–124; Teetzmann, *Europäische Identität im Spannungsfeld von Theorie, Empirie und Leitbildern* (Göttingen, 2001); Siedentop, *supra* note 133, Chap. 10 (pp. 189–214); Pache, “Europäische und nationale Identität: Integration durch Verfassungsrecht?”, 117 DVBL (2002), 1154–1167.

144. Hobsbawm, *supra* note 130, at pp. 20–22; 54–63; 97–100.

tage exists<sup>145</sup> and with it at least a cultural, and to a lesser extent a political, European identity. As Jean-Jacques Rousseau asserted as long ago as 1772: “Il n’y a plus aujourd’hui de Français, d’Allemands, d’Espagnols, d’Anglois même, quoi qu’on en dise; il n’y a que des Européens.”<sup>146</sup> Although this statement is in part wishful thinking, it demonstrates that at least among European intellectuals a European consciousness has existed for a long time. The question is whether this consciousness is shared by the population. In this regard, opinion polls offer a mixed picture. For example, no specific European characteristic (e.g. cultural or educational, religious or moral) could be named by more than 15 % of those Germans asked in April 1999 for European characteristics. But 21 % said that Europeans do *not* differ from other nations in the world.<sup>147</sup> On the other hand, especially in Germany, the accession of countries such as Poland, Hungary or the Czech Republic is welcomed, mostly (by 52%) with the argument that “they are Europeans and all Europeans are supposed to be in the Union”.<sup>148</sup> According to other polls, in spring 1999, 56% of the those asked felt “very” or “pretty much” aligned to Europe.<sup>149</sup> Apparently, no clear self-image exists, only a diffuse, “irrational” sense of “European-ness”.

This observation is countered by the objection that a further strengthening of European identity would undermine national identities. The response to this criticism is that individuals have multiple identities, for example as a German, a woman, a mother, a Christian, and so on. European and national identities are not competitive, but complementary. This is accurately expressed in the EC Treaty, which states that: “Citizenship of the Union shall complement and not replace national citizenship.” (Art. 17(1) EC; Art. 8(1) Draft Constitution). The affiliations need not be ranked in an abstract hierarchy, so European identity would not necessarily trump national identity. The actual weight of the respective identity depends on the concrete circumstances. In some instances, self-perception as a European may be more important than national identity; in other situations the opposite will be true. Multiple identities do not lead to a *loyauté zéro*<sup>150</sup> towards the different com-

145. See only Stolleis, “Das ‘europäische’ Haus und seine Verfassung”, 78 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1995), 275, at 279; also Habermas, “Die postnationale Konstellation und die Zukunft der Demokratie”, in Habermas, *Die Postnationale Konstellation* (Frankfurt a.M., 1998), p. 91, at 155–156.

146. Rousseau, *Considérations sur le gouvernement de Pologne et sur sa réformation projetée en avril 1772*, in *Oeuvres Choiesies* (Paris, undated) p. 341, at 351.

147. Noelle-Neumann, “Die öffentliche Meinung”, *Jahrbuch der Europäischen Integration* (1998/99), 311, at 315 with more specific indications.

148. Noelle-Neumann, *supra* note 147, at 316.

149. 78% in Luxembourg; 58% in Germany, 37% in the UK: 51 *Eurobarometer* (July 1999) 8–9.

150. But see Sur, “L’état entre l’éclatement et la mondialisation”, 30 *Revue Belge de Droit International* (1997), 5, at 10.



munities; it is not a zero-sum-game. European identity does not grow at the cost of national identity; what we are experiencing instead is an enlargement of identity.<sup>151</sup>

#### 3.2.4. *What really matters*

To conclude this part of the analysis, it will be suggested that homogeneity– and identity-discourse does not merit further discussion.

##### 3.2.4.1. *The absence of fixed segmentation*

The kernel of truth in the homogeneity-discourse is that majority-decisions that also bind the minority will be accepted by the latter only if the members of the defeated group can hope to gain the majority on another occasion. In representative democracies, this is possible only if group-affiliations (e.g. ethnic, religious, economic) are not so dominant that they determine the votes of the group members in decisions on all subject matters. If they are so dominant, we have a strictly segmented society which will not be democratically viable. So what matters is not “homogeneity”, but the absence of fixed segmentation – the two are not identical.

Of course, European citizenry is divided by comparatively strong national affiliations. But this is not the only divide. There are changing coalitions and overlapping memberships in and between different groups: the opinions and votes of citizens also depend on their political philosophy, which is trans-boundary. Dividing lines may run between large Member States and small ones, between industrial and agricultural Member States, between those with high environmental standards and those with lower ones, and so forth. Consequently, we have a relatively high number of sub-cultures, which overlap, so that no dominating cleavages emerge. The more that European policy-making proliferates and covers diverse subject matters, the more improbable becomes the permanent marginalization of a specific group.

##### 3.2.4.2. *Cognitive and ethical capacities of citizens*

If we look more closely at the idea of “European identity”, it must be admitted that such a collective identity is not in itself a pre-requisite of democratic culture, but consists in the virtues which ostensibly flow from it, namely responsibility, solidarity, a willingness to compromise, trust, and tolerance. These virtues do not require a common identity. Solidarity, for instance, does not only emerge via the opposition of “Us” and “Them”, but from compassion for the well-being of other individuals. The formation and growth of these virtues however, require citizens to have minimum ethical and cogni-

151. Münch, *Globale Dynamik, lokale Lebenswelten* (Frankfurt a.M., 1998), at p. 308; contra Schachtschneider, *Res publica res populi* (Berlin, 1994), at p. 1189.

tive capacities. European citizens must, first of all, know something about European society. This knowledge can not for the most part be learned from books, but is generally acquired by living in society. Second, citizens must possess a minimum ethical capacity<sup>152</sup> in relation to this society. To give an example: a Union-wide majority vote (in Council or in Parliament) on traffic policies which burden different regions very unevenly appears to be unfair, if the voters do not take into consideration the special burden of a transit country such as Germany or Austria. The reason for a lack of consideration does not, however, lie in essential group-specific difference or other differences, but in the fact that most European voters do not know the traffic situation in a transit country from their own life-experience. Greater knowledge and a better sense of responsibility would influence voter behaviour, but would not determine the outcome of a vote.

### 3.2.4.3. *A procedural, not substantive basic consensus*

As regards the so-called “basic consensus”, it has just been argued that this is – in any pluralistic society, and also at the European level – necessarily extremely general. A procedural consensus, for instance on the validity of the majority principle for the resolution of conflicts, is therefore perhaps more important.<sup>153</sup> To focus on cognitive and ethical capacities and on a procedural basic consensus, as opposed to homogeneity and a substantive consensus, is not to pre-determine the outcome of political decisions. Only open-ended criteria are appropriate for an open society.

### 3.2.5. *All extra-legal factors can evolve within democratic structures*

To finish the discussion of the extra-legal factors for a functioning democracy, it is stressed that none of these factors is a natural, or absolute, prerequisite of democratic governance – which, in other words, would have to be present in full before government could begin. The cultural-societal factors are not *a priori* factors, but we must reckon with their evolution within and through democracy. Legal institutions interact with cultural factors. The citi-

152. This minimum is the recognition of the universal principle of practical ethics, the “golden rule”, which asks us to behave toward our neighbour as we expect him to behave towards us (Matth. 7,12; Luc. 6,31; Tob. 4,5). See in detail Schrey and Hoche, “Regel, goldene (I. Antike bis Aufklärung; II. Die goldene Regel seit Kant)”, in Ritter and Gründer (Eds.), *Historisches Wörterbuch der Philosophie Vol. 8* (Darmstadt, 1992), column 450–464, with further references, also on pre- and non-Christian formulations of this principle.

153. On the importance of a procedural consensus Fraenkel, “Historische Vorbelastungen des deutschen Parlamentarismus”, in Fraenkel, *Deutschland und die westlichen Demokratien* (Frankfurt a.M., 1991, orig. 1960) p. 23, at 65; DeWiel, *Democracy: A History of Ideas* (Toronto, 2001), at 3–10, 6, 142–179. For the EC/EU, von Bogdandy, *supra* note 139, at 181–182.

zens' ethical capacities and public discourse enhance and support the functioning of the institutions, but those institutions in turn are apt to improve the democratic virtues and capacities of the citizens. Moreover, it is understandable that the average citizen becomes involved only when he or she realizes that engagement makes sense. Correspondingly, it can be expected that citizens will become interested in the EP and seek information about it when it possesses real political power. In short, all extra-legal factors are dynamic and the existing deficiencies are not an absolute impediment to a European democracy.

### 3.3. *The size of the democratic territorial unit*

Some people fear that European democracy might fail because of the Union's sheer size.<sup>154</sup> But a difference in kind seems to exist only between those very small communities in which a popular assembly can decide and larger ones which require a system of representation. Within a representative system, no simple line can be drawn between large and "too large."<sup>155</sup> It has been argued that even if the EU exactly reduplicated the system in the Member States, it would still be less democratic than the individual States. This is so because the impact of each citizen's vote is diminished in relation to the whole, and because the relationship between citizens and their representatives changes when one MP represents a much greater number of individuals.<sup>156</sup> But this argument reduces democracy to democratic input. Democracy does not only result from citizens' participation in decision-making procedures, but also from the fact that decisions matter and have an impact on their lives.<sup>157</sup>

Roughly speaking, citizens' input is maximized in smaller entities, and effective democratic output may require a larger entity – although this is an over-simplification. In smaller units, citizens can communicate more easily with their political leaders, and institutions tend to be more responsive.<sup>158</sup>

154. Schmitter, *How to democratize the European Union ... and why bother?* (Lanham, 2000), at 8–9; MacCormick, "Problems of Democracy and Subsidiarity", 6 EPL (2000), 531, at 534–535.

155. Dahl, *Democracy and its Critics* (New Haven, 1989), at 217.

156. Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", 1 ELJ (1995), 219, at 232.

157. Scharpf puts this as follows: Both authenticity and effectivity of the citizens' self-determination must be guaranteed (Scharpf, *supra* note 9, at 27); already seminal is Scharpf, *Demokratietheorie zwischen Utopie und Anpassung* (Constance, 1970), at 21–28; see also Scharpf, *supra* note 4. Building on Scharpf, see Benz, *Postparlamentarische Demokratie?* (Opladen, 1998), at p. 202; see also Zürn, *Regieren jenseits des Nationalstaats* (Frankfurt a.M., 1998), at p. 236, on the input- und output-dimension of democracy.

158. Dahl and Tufte draw from a detailed empirical study the conclusion that these positive

On the other hand, a dissenting citizen can not easily voice his objections, because social pressure is higher in a smaller unit. On the output-side, it has to be acknowledged that there is no optimum size for a political unit in terms of efficient problem-solving. Larger entities can specialize and have more options for action. On the other hand, they are cumbersome. It all depends on the concrete problem. In any case, neither the aspect of democratic input, nor the aspect of democratic output, and certainly not both together, result in an ideal size for a democratic polity.<sup>159</sup> The sheer size of the EU may even be a democratic advantage, because minority-protection and conflict-management seem to be easier in a larger unit. In large democracies, conflicts are not so personalized. This means that although there are more conflicts, they are less apt to polarize society.<sup>160</sup> In sum, the EU's size is not a barrier to a viable European democracy.

#### 4. Conclusion: Beyond the 2003 Convention

In this paper, I assessed the quality of European democracy in the light of the real, not idealized, state of democracy in the Member States, and in the light of the global dimension of the problem. Anti-democratic effects of globalization foreclose the "resigned" option of renouncing further democratization of the Union. Seen in this context, the status quo of government in Europe (before the Convention and the IGC 2003) appears slightly less democratic than in the Member States, with crucial deficiencies in transparency. The 2003 Draft Constitution improves the democratic twin exercises of law-making and control of government in a substantial, but not revolutionary manner. Also, guarantees of transparency have been elevated to constitutional status by the Draft Constitution. Moreover, the extra-legal factors of a functioning democracy are present *in nuce* and can evolve in interaction with legal institutions. Finally, the size of the Union is no democratic problem as such. Against this background, the prospects for the EC/EU are those of a semi-parliamentary and semi-consociational democracy.

effects work only when the units are *very small* (in Sweden communities of less than 10,000 inhabitants (Dahl and Tufte, *Size and Democracy* (Stanford, 1973), at pp. 41–65).

159. Cf. Dahl and Tufte, *supra* note 158, at 108–109, 135, 138.

160. Dahl and Tufte, *supra* note 158, at 92; see already Federalist No. 10 (Madison), in Hamilton, Madison and Jay, *The Federalist Papers*, ed. by C. Rossiter (New York, 1961, orig. 1788), at 83.

#### 4.1. *A European semi-parliamentary democracy*

Within a European democracy, the parliament will play a different and more minor role than the traditional ideal of parliamentarism supposes.<sup>161</sup> This foreseeable evolution is not a specifically supranational one, but corresponds to the general decline of parliaments. The weakness of the European Parliament is put into perspective by a fundamental modification of parliamentary functions in the nation State. This trend has already been described by some as post-parliamentarism.<sup>162</sup> At present, national parliaments are far from sovereign, to the extent that they are dominated by political party discipline and coalition agreements. They are marginalized due to the predominance of the executive in the legislative process and the powerlessness of the parliamentary opposition. They are dependent on technical experts and are bypassed by secret negotiations and the direct networking of individual citizens.

The theory of deliberative democracy has consoled us concerning the decline of parliamentarism, as it stipulates that the democratic process is not in the first place justified by citizens' isolated acts of participation, but by general accessibility to a deliberative process.<sup>163</sup> Deliberative theorists argue

161. Magnette, "L'Union européenne: Un régime semi-parlementaire", in Delwit et al. op. cit. *supra* note 60, 25–54, esp. at 32–33; Magnette, *L'Europe, l'état et la démocratie* (2000), at p. 221; Coultrap, "From Parliamentarism to Pluralism: Models of Democracy and the European Union's Democratic Deficit", 11 *Journal of Theoretical Politics* (1999), 107–135 (arguing for the appropriateness of a "pluralist" model of democracy, with emphasis on societal interest groups and a fragmented governmental structure); Peters, *supra* note 11, at 754–758. See also Craig, *supra* note 41, at 43–64, arguing for a "*republican conception*" of European democracy, which takes seriously the "idea of a democracy based upon institutional balance" (at 43).

162. Andersen and Burns, "The European Union and the Erosion of Parliamentary Democracy: A Study of Post-parliamentary Governance", in Andersen and Eliassen (Eds.), *The European Union: How Democratic is it?* (London, 1996), pp. 227–251. The authors state "that the conventional idea of popular sovereignty in representative government has been and continues to be marginalized. Such government lacks the structural competence ... to deal with the myriad of differentiated processes and governance challenges of modern societies. ... Monitoring, overview, investigation, deliberation, decision-making is far beyond the capacity of parliament (and its membership), no matter how large, how capable, how well organized, how specialized" (ibid., at 244–245). Therefore, a post-parliamentary system has evolved, which is characterized by the prominent role of interest groups (as opposed to individuals and their "territorial" representatives), the central role of experts, and the shift away from Parliament into informal groupings and networks. "These forms [of governance] also realize, in a certain sense, general cultural notions of democracy, namely the right to form groups or organizations in order to advance or protect interests and the right to voice an opinion and to influence policies or laws that affect one's interests or values" (ibid., at 240).

163. Standard works are Dryzek, *Discursive Democracy* (Cambridge, 1990); Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago, 1994); Fishkin, *Democracy and Deliberation* (New Haven, 1991); Nino, *The Constitution of Deliberative Democracy* (New Haven, 1996); Elster (Ed.), *Deliberative Democracy* (Cam-

that the traditional two-fold role of parliaments – decision-making and democratic control – is already and will be even further superseded (albeit not completely) by public, deliberative mechanisms.<sup>164</sup> The legitimacy of law-making will stem from improved, representative deliberative networks (such as committees of experts or NGOs), not primarily from parliamentary activity. Public control of government will no longer be exercised by parliaments, but through additional forms of institutionalized control.<sup>165</sup> Such supplementary mechanisms of control might consist of elected expert committees and – with reservations – also NGOs.<sup>166</sup>

This means that the legitimacy function of conventional voting and parliamentary elections is complemented and to a certain extent replaced by a well-functioning public discourse and quality deliberation. This also means that the function of parliament can and should be re-formulated. It might be that parliaments are to acquire a new role as mediators of deliberative politics. They could become the “communicative relay”<sup>167</sup> between citizens and

bridge, 1998). A collection is Bohman and Rehg (Eds.), *Deliberative Democracy: Essays on reason and Politics* (Cambridge (Mass.) 1997). See also (in part referring to Europe) Manin, “On Legitimacy and Political Deliberation”, 15 *Political Theory* (1987), 338, at 351–352 and 359–360; Habermas, *Faktizität und Geltung* (Frankfurt a.M., 1992), at 532–533; Dryzek, “Political and Ecological Communication”, 4 *Environmental Politics* (1995), 13, at 23; Benhabib, “Toward a Deliberative Model of Democratic Legitimacy”, in Benhabib (Ed.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton (N.J.), 1996), pp. 67–94, esp. at 68; Habermas, “Drei normative Modelle der Demokratie”, in Habermas, *Die Einbeziehung des Anderen* (Frankfurt a.M., 1996), p. 277, at 284–292. More recent studies include Palazzo, *Die Mitte der Demokratie: Über die Theorie deliberativer Demokratie von Jürgen Habermas* (Baden-Baden, 2002); Thüser, “Deliberative Demokratie und Abstimmungsdemokratie”, in Donatsch, Forster and Schwarzenegger (Eds.), *Festschrift für Stefan Trechsel zum 65. Geburtstag* (2002), pp. 169–187. Application of the deliberative model to the EU: Curtin, *supra* note 100, at 185–280; Curtin, *supra* note 58, at 53–55; Joerges and Neyer, *supra* note 84, at 273–299, esp. at 282; Joerges and Neyer, “Transforming strategic interaction into deliberative problem-solving: European comitology in the foodstuffs sector”, 4 *Journal of European Public Policy* (1997), 609–625, esp. at 617–621; Habermas, *supra* note 145, at 154–155; Eriksen and Fossum, “Post-national integration”, in Eriksen and Fossum (Eds.), *Democracy in the EU: Integration through Deliberation?* (London, 2000), p. 1, at 15–21; Eriksen and Fossum, “Conclusion: Legitimacy through deliberation”, *ibid.*, pp. 256–269; Eriksen, “Deliberative supranationalism in the EU”, *ibid.* pp. 42–62; Karlsson, *supra* note 4, at 57–75, 227–249.

164. Habermas, *supra* note 145, at 166.

165. See, already, the Federalist No. 51 (Madison), in Hamilton and Madison and Jay, *supra* note 160, at 320, 322. The seminal work for modern government is Majone, *supra* note 56; Majone, “Independence versus Accountability? Non-Majoritarian Institutions and Democratic Government in Europe”, 1 *The European Yearbook of Comparative Government and Public Administration* (1994) 117; G. Majone, *Regulating Europe* (London, 1996), esp. at pp. 284–301.

166. See on NGOs as a functional surrogate for the lacking opposition on the global level Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (London, 1996), at p. 198.

167. Marschall, “Parlamentarische Repräsentation in der Informationsgesellschaft”, 45 *Zeitschrift für Politik* (1998), 282, at 294, 298–299.

institutions, or be considered as a “symbolic incarnation of the locus of popular sovereignty”.<sup>168</sup> These roles are in part already fulfilled by the European Parliament and are strengthened by the 2003 Draft Constitution.

At the European level, one strategy that could complement parliamentary activity would be the establishment of European referendums.<sup>169</sup> Of course, there are issues which are not suited to direct popular decision, for instance policies involving the re-distribution of wealth. But resort could be made to referendums selectively, in order to decide simple questions of constitutional importance, such as defence or environmental issues. As already mentioned, this proposition was discussed in the Convention, but ultimately rejected.<sup>170</sup> At least a weaker tool, the citizens’ initiative, by which a significant number of citizens may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution, was introduced (Art. 46(4) Draft Constitution).<sup>171</sup>

#### 4.2. *European semi-consociational democracy*

Besides the semi-parliamentary nature of the emerging European democracy, its second characteristic is its consensual or consociational nature.<sup>172</sup> I have already pointed out that the current dominance of the consensual modus of decision-making in the Council can be interpreted as a manifestation of a consensus-type democracy, as opposed to a majoritarian democratic system. The Draft Constitution has substantially extended majority voting in the Council, but has preserved unanimity voting in areas of high political sensitivity, notably in the CFSP. Moreover, under the new scheme of double majority, a simple majority of citizens’ (indirect) support is not sufficient, but a 60 percent representation, hence a broader support, is required. This rather high threshold was finally agreed upon, although the Commission and various Convention members had opted for a simple majority of the population.<sup>173</sup>

168. Beyme, *Parlamentarische Demokratie*, *supra* note 9, at 544. See already Andersen and Burns, *supra* note 162, at 248–251.

169. Vibert, *supra* note 68, at 177–178 and 232; Scharpf, *supra* note 122, at 242; for the constitutional level Pogge, “How to Create Supra-National Institutions Democratically”, in Føllesdahl and Koslowski, *supra* note 31, 160, at 171–185; Schmitter, *supra* note 154, at 120–125. See the empirical study on the use of *national* referendums on European issues by accession candidates and Member States: Hug, *Voices of Europe: Citizens, Referendums and European Integration* (Lanham, 2002).

170. See *supra* note 25.

171. *Supra* section 1.5.

172. Lord, *supra* note 4, at 46–54, esp. at 49; Peters, *supra* note 11, at 758–760.

173. See amendment forms relating to Art. 24 of the Final Draft in european-

Consociational elements of government feature more or less prominently in countries such as Switzerland, Austria, the Netherlands, Belgium and Luxembourg. In an (ideal-typical) consociational democracy, consensual or nearly consensual decision-making is the rule. All societal groups and minorities are integrated into the political system. Government and other political and societal bodies are constructed by proportional representation.<sup>174</sup> The drawbacks of consensual democracy are well-known. The most serious one is the fact that the lack of real political alternatives provokes the formation of populist and extremist groups or parties. However, a consociational democracy may be appropriate for periods of transition, applicable in societies which lack the prerequisites for the smooth functioning of majority rule.<sup>175</sup> We have seen that the EU is in such a transitional phase, so that the consensual model roughly “fits” in that regard.

Viewed through the lens of transnational consociational democracy, the reduction of parliamentary functions is consistent. Those States which practise consensual democracy build consensus predominantly through extra-parliamentary channels, such as referendums. This procedure integrates minorities into the decision-making process. Consequently, in order to transform the EU into a consociational system, it would have to move beyond a merely *intergovernmental consensus* and acquire a *popular consensus*. This brings us back to the quest for complementary European referendums, which was turned down in the Convention.<sup>176</sup>

#### 4.3. *A look ahead*

The 2003 Draft Constitution continues on the well-known, unexciting path of slowly, but steadily strengthening the EP and extending majority voting in the Council. More radical are the suggestion to publicize the entire phase of legislation of any type and the introduction of the citizens’ initiative. In par-

convention.eu.int/amendments.asp?content=417999&lang=EN (visited on 18 Sept. 2003): van Lancker (MEP/Belgium); Einem (MEP/Austria); Olesky (MP Poland, (Berger (MEP/Austria); Kaufmann (MEP/Germany); Papandreou/Katiforis (Greek Government). See for the Commission’s position amendment form Barnier/Vitorino/O’Sullivan/Ponzano (id.), also Press Release IP/03/611 on Commission discussion of 30 April 2003, “Commission examines proposals for institutional reform ahead of next Convention meeting”.

174. A seminal work is Lehmbruch, *Proporzdemokratie* (Tübingen, 1967); see also Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven, 1984), esp. at pp. 21–23, 207–208; Abromeit, *Interessenvermittlung zwischen Konkurrenz und Konkordanz* (Opladen, 1993); Schmidt, *Demokratietheorien* (Opladen, 1997), at pp. 229–252 (distinction between consensual and consociational democracy at 242).

175. Vibert, *supra* note 72, at 159–160; critically Katz, *supra* note 32, at 74.

176. *Supra* note 25.



ticular the latter reform proposal is a move towards a semi-parliamentary and semi-consociational democracy. It may be objected that this orientation, which implies a certain reformulation of the democratic yardstick, is in reality a distortion which privileges the status quo, blurs further the already blurry concept of democracy and sells an undemocratic regime under a misleading, but prestigious label. My response to this objection is that a regime may, without abusing the term, be called “democratic” as long as the various interest groups have the opportunity to influence the process of decision-making at any of its various levels, and as long as various groups can trigger diverse mechanisms of control of the government – even if government decisions may not be the expression of an electoral majority.

In any case, the label does not matter so much, because democracy is not an end or a value in itself, but serves material objectives. From this perspective “democracy is”, as Winston Churchill said, “the worst form of Government except all those other forms that have been tried from time to time”.<sup>177</sup> The proposal to combine majority voting with consensual decision-making and to supplement an inherently deficient parliamentary control by other, decentralized mechanisms of public control<sup>178</sup> is intended to strengthen the moral autonomy and self-determination of the citizens, to deepen their understanding of public affairs, to protect individuals’ interests and create a pool of expertise. Because it seems both feasible and likely to generate at least some of the above-mentioned positive effects, a semi-parliamentary, semi-consociational democracy deserves consideration.

177. Speech of 11 Nov. 1947 in the House of Commons, repr. in W. Churchill, *His Complete Speeches 1897–1963* (New York, 1974), at 7563, 7566.

178. Magnette, *L'Europe*, *supra* note 161, at 222–227.